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THE

GOVERNMENT OF ENGLAND

ITS STRUCTURE

AND ITS DEVELOPMENT

BY

THE HONOURABLE

WILLIAM EDWARD HEARN, Q.C., M.L.C.

CHANCELLOR OF THE UNIVERSITY OF MELBOURNE

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INTRODUCTION.

THE English Constitution forms a part of the Common Law. Our government by King, Lords, and Commons, the mutual relations of these several powers, our courts of law and of equity, our great offices of State, are all, and from their earliest rudiments have been, known to the law, and recognized by it. Obvious as this proposition now appears, it has not always been followed in practice; even yet, perhaps, it sometimes is not thoroughly understood. To the ingenious inventors of paper constitutions in the last century the unwritten traditions of our political system supplied a favourite subject for sarcasm and contempt. These politicians could not believe in any system of polity which was not expressed in words and figures; where there was no delicate adjustment of powers, and where the right of men to cashier their rulers was not prominently set forth. But the law of political conditions, like the law of property or the law of obligations, or any other portion of our jural system, needs not the formal statement of a code. "That ancient collection of unwritten maxims and customs," of which this branch of our law forms a part, has its own inherent vitality. It is no subtle contrivance of human art, but is one of the forms in which national life is manifested. Like the phenomena of language or the usages of common life

Constitution a part of the Common Law.

or the various developments of co-operation and of exchange, the principles of justice are, sometimes with greater sometimes with less success, spontaneously developed in the social state. In our country the course of this evolution has met with little disturbance. There, while the mechanical contrivances of political inventors have crumbled away in the hands of the projectors, the goodly tree of British freedom, selecting from the kindly soil and assimilating its fit nutriment, still increases its stately bulk, and still extends its unequalled development. Outliving the storms and the vicissitudes of centuries, deeply rooted in the habits and the affections of the people, it spreads far and wide its hospitable shade ; and, like that typical mustard tree in whose over-shadowing branches the fowls of the air find shelter, it affords in the evil days to many a weary wing and many a scared and fluttering guest a secure asylum and an inviolable home.

This conception of the Constitution as forming a part of the Common Law not only accounts for its peculiar form, but is essential in determining its relation to the other parts of our legal system. Our political usages and powers have been too often regarded as something apart from and above the law, and not as co-ordinated with it. In the days of the Stuarts learned divines taught in their pulpits and their universities that the authority of the King was a direct emanation from heaven, giving, supporting, and maintaining the law, but not controlled or judged by it. Judges have not been slow at times to magnify the transcendent powers of Parliament, and their own inability to deal with questions of parliamentary law. The House of Commons even in the present reign has claimed, though happily in vain, a supremacy not short of the divine right of Charles or of James. Nor have there been wanting amongst us those

Constitution belongs to law of political conditions.

ominous voices, so familiar to the ears of Frenchmen and of Americans, which declare—as the Athenians, in their hour of passion and when hurrying to their downfall, declared—that the laws are the laws not of the monarch but of the people, and that the people may do what they like with their own. But no such doctrines are known to English law. In that noble system the law of political conditions spontaneously finds its appropriate place. The status of the Crown and the status of either House of Parliament are as clearly defined as the status of a corporation or of an ordinary citizen. From the days of Bracton, who declared that *Lex facit quod ipse sit rex*, to the days of Lord Denman, who ruled that there is no body in this country which is not subject to the law, the principle has been unchanged. The prerogative of the Crown denotes those powers, immunities, and privileges which the Common Law gives to the monarch. The *lex et consuetudo Parliamenti* is that portion of the Common Law which ascertains the rights and duties, the powers and the immunities, of the Houses of Parliament and of their several members. But every power and every privilege, to whomsoever it belongs, is given by the law, is exercised in conformity with the law, and by the law may be either extended or extinguished.

Unity of English political history.

Apart from any consideration either as to its form or its position, our Constitutional Law derives another advantage from our conscious and continued reference of it to the Common Law. As this connection both explains the form in which our Constitution has descended to us, and assigns to it its fitting place in our polity; so also it accounts for the remarkable unity by which our political history is characterized. Few historical subjects, indeed, present so marvellous a tale or excite so deep an interest. Our freedom has, in the

language of one of its greatest expounders,* "its pedigree and its illustrating ancestors; it has its bearings and its ensigns armorial; it has its gallery of portraits, its monumental inscriptions, its records, evidences, and titles." The Constitution of England under Queen Victoria is, indeed, the very Constitution under which the Confessor ruled and which the Conqueror swore to obey. There is between the two states the same resemblance that there is between the infant and the man, between the seedling and the full-grown tree. But it is not more certain that the stateliest oak that now graces the green fields of England was once an acorn, or that the bearded and ambitious warrior, in the full vigour of his strength, once lay a helpless infant mewling in his nurse's arms, than it is that this wondrous Constitution, so old, yet stretching forward (if Heaven pleases) to such indefinite futurity, is the selfsame organism of which we may trace the rudiments in the laws of Ina. The proof of this assertion is neither obscure nor difficult. No person will contend that the present Constitution of England is different from that which was reformed in 1832. No organic change had taken place between the Reform Act and the Restoration. But the Bill of Rights made only two important innovations. It abolished the Royal power of suspending laws or dispensing with them; and it prohibited the maintenance, without the consent of Parliament, of a standing army. In all other respects this great measure was essentially a declaratory enactment. Even in the two instances in which it produced a change, it professed, although probably erroneously, the same character. Change was not its object: it merely sought to guard against the improper exercise of certain lawful powers of the Crown. With these

* Burke's *Works*, iv. 178.

two exceptions, it made no change in our constitutional law. It took away nothing ; it added nothing ; it altered nothing. In like manner, the Petition of Rights and the great reforms of the Long Parliament in its early days were all merely negative. The work of the great popular leaders of that day was a work of restoration, not of change. They desired to remove the unsightly excrescences of our Constitution, the gilding and the plaster with which profane and inartistic hands had deformed the grand old temple of liberty that lay sullied but uninjured beneath. Not a stone of the original structure did they wish to move ; not a fragment of the time-honoured edifice that they did not regard with affectionate veneration and pious solicitude. But the Star Chamber and the High Commission, the Council of the North and the Council of Wales, the *lettres de cachèt*, the unlawful taxes, the forced loans, the penal billeting of soldiers, these were claims to which England had never tamely submitted under the Plantagenets, and which she was not likely to endure under the Stuarts. If we refer to the Acts which the leaders of the Commons cited in that struggle, if we look back through four centuries, to the days of the first Edward, to the Charter that Bigod and De Bohun won, and to the yet more memorable contest at Runingmede, we shall find by the unanimous and repeated declaration of our Books that the Great Charter itself is but declaratory of the Common Law. If we retrace the course of our history through another eventful century and a half to the period at which the final element was added to our complex nationality, we find this same Common Law in full vigour and undisputed supremacy. Ere he ascended the throne to which "the great assize of God's judgment in battle" tried on the field of Senlac had established his right, the Conqueror himself in all the power of his victory

swore, as his predecessors had sworn, to hold by the ancient laws and to confirm the old liberties. That oath which the Norman Duke then swore was the same oath which our records * tell us had been sworn by Æthelred; and that oath of Æthelred is in effect the same coronation oath which all subsequent sovereigns have taken. Its terms only were rendered more precise at the Revolution of 1688, but the substance continues unchanged to this day.

Influence of law on English politics.

We thus see the explanation of a fact in our parliamentary history which has often excited comment. In all our great constitutional struggles the question has been invariably argued on either side as a question of dry law. On such occasions large views of public policy have usually been put aside. It has been the uniform policy of our Constitution to claim and assert our liberties as an entailed inheritance derived by us from our forefathers and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right.† As Lord Macaulay‡ has observed, in the great debates of our history there is not a word about Timoleon or Aristogeiton, about Brutus the elder or Brutus the younger. When the Lords and the Commons held their famous Conference respecting the vacancy of James the Second's throne, and the fate of England was trembling in the balance, Somers and Nottingham disputed as if they were arguing a demurrer. Eighty years earlier Bacon and Hakewell in the House of Commons argued in the same spirit the great grievance of the impositions. Nearly four centuries before, in the hour of their distrust and disquiet, every doubt was quelled and

* See Kemble, *Saxons in England*, ii. 35.

† Burke's *Works*, iv. 177. ‡ *Hist. Eng.*, ii. 600.

every wavering resolution was confirmed when the patriot Primate produced to John's exulting barons the forgotten charter of their rights under the seal of Henry Beauclerc. That charter had itself been won not by any abstract argument, but by incessant appeals to the "good laws of the Confessor." This practice grew up from the general concurrence of all parties that the position of the Crown was sufficiently ascertained by law, and from the conviction of the people that that law must be favourable to them. They wanted nothing new: to stand upon the old ways was their interest and their desire. Expediency is always open to debate. It admits by its very nature different opinions. But right *lucet ipsa per se*. If its existence be once established, there can be no further question. Proudly conscious, therefore, of this right that they had inherited from their forefathers, English patriots would never submit to any decision of policy. The law had guaranteed to them and to their heirs, as in the olden days it had guaranteed to their fathers, the rights anciently used and approved. They could establish their custom, and they cared little for political speculations.

Our history thus enables us to discover the principle of our political law, and our law in turn explains much that is mysterious in our history. Yet notwithstanding this intimate connection, our political law to many readers is, or has been until the last few years, a sealed book. If an Englishman were asked from what source a knowledge of our Constitution might be gained, he would probably refer the inquirer to those three great statutes which Lord Chatham called the Bible of the British Constitution; yet a reference to them would be strangely disappointing. In Magna Charta the inquirer would read of the writ *mort d'auncestor* and the assize of novel disseisin; of scutages and aids, of weirs and rivers,

Evidences of political law.

and of weights and measures. In the Petition of Rights he would find an emphatic protest against the illegal exaction of money by the Crown, and some other grievances long since disused. In the Bill of Rights there is a catalogue of James II.'s misdoings and an impracticable prohibition against the Sovereign's marriage with a papist. We have, however, the satisfaction of knowing, on the respectable authority of Blackstone,* that if in the case of any future King there should arise precisely the same conjunction of circumstances as those set forth in the Bill of Rights, it may be safely concluded that such King has abdicated his crown. Even the celebrated section in Magna Charta, the section of *Nullus liber homo*, those three words of barbarous Latin that Lord Chatham declared to be worth all the classics, is hardly appropriate. It belongs to a different chapter of the law from that with which we are now concerned. It forms the foundation rather of the law of primary general rights than of the law of political conditions. The learning of this latter branch is found much less in the statute book than in the old writs of summons, in the decisions of the courts, in parliamentary precedents, in official traditions and practice. There is no positive law for the establishment of our national representation.† No statute, no rule of Common Law, no resolution even of either House of Parliament, has yet recognized the Cabinet itself. The real organ of executive government under our present system is a body yet unknown to the law. That great change in our Colonial system which is known as the introduction of Responsible Government was effected solely by a despatch from a Secretary of State. This despatch did not even affect the legal tenure of

* See 2 Stephen's *Commentaries*, 503.

† 1 *Report of Committee of the House of Lords on the Dignity of a Peer* (hereafter cited as *Lords' Report*), 175.

Colonial offices; it merely described the circumstances in which the Crown would exercise its right of displacing at its pleasure certain classes of its servants. In the body of the Act,* for example, which conferred upon Victoria its present form of government, the words Responsible Minister, or any equivalent terms, never once occur. Were it not for a marginal note, which forms no portion of the Act, not even a hint would be given by this statute of the important change which it was intended to effect.

I propose, then, in the following pages to describe the Constitution of England as it is now understood, and to trace the steps by which it has attained its present form. I shall consider the nature of the kingly office, and the character of the limitations to which it is subject. I shall investigate the immunities that are attached to the Royal person, and shall trace the influence of the various theories as to the extent of the Royal power upon some remarkable events in our political history. The limitation of the prerogative consists in the exercise of the functions of Royalty in the manner prescribed by law and in no other manner. These functions, according to the usual division, are legislative or judicial or administrative. Each of these great branches requires separate consideration. I shall therefore notice certain doctrines, once maintained but now abandoned, of which some tended to extend, others to restrict, the legislative power of the Crown. I shall next consider the existing mode of legislation, and shall indicate the various forms under which, at different periods of our history, that power was exercised. Next to the making of the law comes its interpretation. This subject includes the rise of a separate judiciary, and of the various methods by which the just

Summary of contents.

* 18 and 19 Vict., c. 55, and Schedule 1 thereto.

and undisturbed administration of justice is secured. In the case of the executive branch of our government its theory has been of later development than that of the other two branches. It is now, however, settled that all acts of the Crown must be done with the assistance of some officer known to the law : that every such officer and every councillor is personally liable for the acts that he performs or the advice that he gives ; that this liability cannot be avoided by pleading the personal commands of the King, and that it may be enforced either before the ordinary tribunals of the country or by the peculiar process of impeachment.

While positive provision is thus made for the legal exercise of the Royal administrative power, the law neither imposes nor can impose any direct restriction upon the exercise of that discretion which must be largely vested in the Crown. This is that part of the subject on which the greatest difficulties in modern times have arisen. The solution of these difficulties, which has been but recently effected, is found in an extension of the principles that govern the preceding cases. The discretion of the Crown is guided by its principal servants, and those servants must answer at the risk of their offices for their success. The tribunal which judges of that success is the Parliament. That assembly, the greatest of the councils that surround the throne, and including both the hereditary councillors of the King and the representatives that reflect the varying desires and interests of the nation at large, has among other duties the charge of vigilantly watching the management of public affairs, and of promptly reporting to the King whatever in any part of the state is amiss. Such is the estimation in which the Crown holds this Supreme Council that it will forego the most cherished policy, and will remove from its councils the most favoured servant, if

the united Parliament advise such a course. If, however, there be reason to suppose that the advice of Parliament does not correspond with the sentiments of the nation, the King may by a dissolution of Parliament and the convention of a new Parliament ascertain the sentiments of his people. When their views are distinctly expressed, the King invariably acts in accordance with them. In like manner, when a difference arises between the two Houses of Parliament on some proposed legislation, the Crown, if the difference be sufficiently serious and cannot otherwise be adjusted, refers the question to the opinion of the constituencies, to whose decision the contending parties must submit. If, however, the question relate to matters of administration on which an immediate decision and prompt action are required, the Crown always inclines to the advice of that body which is the image and model of the entire nation. The agency through which the Crown exercises its administrative functions has in recent times undergone a remarkable change. It no longer consists of ministers acting independently of each other, or of a council differing widely on every point of public policy. The Administration is now a united body, agreed generally upon all the leading political questions of the day, consulting upon the general policy which each department should pursue, and tendering to the Sovereign its joint advice. As long as no impediment arises to the exercise of the duty of administration, the Ministry is bound to continue in office. But if the Sovereign refuse to accept their advice, or if Parliament disapprove of their conduct, or reject the measures which they deem essential for the efficient performance of the public service, ministers, if they desire to escape further responsibility, must resign their offices. Those who have censured their conduct or opposed their measures are expected to take the vacant places: and thus

at once, without inconvenience, the vessel of the state is entrusted to other hands and proceeds upon a different course. But it is essential to the success of this operation both that the crew should be skilled in their work, and that they should render due obedience to their commander for the time being, whoever he may be. We thus can explain the true position of the non-political servants of the Crown, and can appreciate the law relating to parliamentary disqualification, a subject in respect to which mistaken views have been often entertained.

I have thus endeavoured to describe the principal parts of our political organism and their mutual relations. But the structure and the functions of that organism cannot be duly appreciated without some inquiry into the circumstances of their growth. I proceed, therefore, to examine some of the principal historical changes through which our institutions have passed. I have attempted to trace the development of each of the two Councils which from time immemorial have been attendant on the Crown. I have more especially sought to show how this original diversity has produced that dual character in our judicial institutions which our systems of Law and Equity and our Courts of Ultimate Appeal still retain. I have explained as briefly and as clearly as I could the conditions under which landed property was occupied after the Conquest, the nature of tenures and their lucrative incidents, the ultimate extinction of the military tenures and the alienation of the Crown lands. With this subject the revenue of the Crown is immediately connected. I have given some account of the remarkable changes which the history of that revenue presents; of the provision which our ancestors made for the support of the Crown by its hereditary revenues and in peculiar exigencies by the contributions which the tenants of the Crown voluntarily agreed to pay; of the gradual

transformation of these voluntary charges upon the Crown tenants into a system of national taxation ; of the conversion of a revenue derived from rents into a revenue derived from taxes. I have attempted also to describe the leading principles of our modern finance, and the means by which provision is made both for the dignity of the Crown and for the performance of the various public services. I have further sought to trace the changes that have taken place in the expenditure of the Crown, and the political consequences which these changes have produced. Next to the changes which time has thus wrought in the position and the influence of the Crown come the still more remarkable changes which the history of Parliament presents. I have endeavoured to indicate the steps by which the Great Council of the Norman kings was gradually transformed into a series of Estates ; and how these Estates, by separation, by coalescence, or by dwindling, became the two Houses of our modern Parliament. Each of these Houses requires separate consideration. In the case of the Peerage, I have described its nature, its origin, and its functions, the mode of its creation and of its devolution, and the securities for its independence with which the law surrounds it. In the case of the representative branch of the legislature, I have ventured to offer an explanation of the appearance in England of that great novelty in practical politics, political representation ; and I have traced the principal events of its early history. I have also attempted to ascertain those general principles which may be regarded as essential to the House of Commons and characteristic of it ; and to distinguish from them those other phenomena which are merely accidental, and have in the course of its history been altered or abandoned without injury to the organism. The same inquiry may be pursued in the case of the constituent bodies. I have narrated their history ; and have

attempted to extricate the general principles which seem to form the foundation of our law relating to the parliamentary franchise. Finally, I have noticed some of the principal checks, whether internal or external, to which Parliament is itself subject ; and I have considered, so far as they are directly concerned with the present purpose, some of those leading primary rights for the maintenance of which Government exists, and of which the perfect exercise conduces to the greatest efficiency of Government.

In this inquiry I have exclusively taken into account historical and jural considerations. I have sought to investigate certain principles in our law of political conditions, not to compose a treatise upon the art of politics. It is no part of my present design to inquire whether, on grounds of political convenience or otherwise, any alteration in our constitutional system should be adopted. Much less do I seek to advocate any particular political views. To those who regard our political system not as mechanical but as organic, who look for political analogies not to physics but to biology, who think that any change in our policy ought to be in conformity with its original type, such an inquiry as the present will appear to have a direct practical interest. To those, on the other hand, who regard political institutions not as the spontaneous growth of social forces, but as artificial contrivances deliberately framed by human ingenuity for human purposes, this inquiry will seem at best merely historical, and will not furnish to them any ground for any political act or forbearance. But my object has been to obtain not fruit but light. I seek only to ascertain what the Constitution of England now is, and how it became what it is. I leave to others the task of inquiring whether or how it should be changed.

CHAPTER I.

THE KINGSHIP OF ENGLAND.

§ 1. Every independent state is within its own limits sovereign. When such a state is established, some organs for the exercise of that sovereignty must exist. These organs are usually, though perhaps improperly, classified according to the number of persons in whom the sovereignty is vested. The supreme power is exercised in some countries by a single person, whether hereditary or elective; in others, by a particular class of the community; in others, by the whole community in public meeting assembled; in others, by some person chosen for the purpose for a limited time; and in others, again, by a combination of two or more of these forms. It is to the latter class that England belongs. That state is an independent, or (as Lord Coke and Lord Hale,* with an unfortunate ambiguity, describe it) an absolute, Sovereign Body. It owes no dependence to any foreign prince or potentate. Its crown is worn by hereditary right, and not, in spite of King John's surrender, as a Papal fief. The constitution of this independent Sovereign Body in England is a limited monarchy. It is a monarchy: that is, the supreme power is vested in one person. It is

Form of Constitution a limited monarchy.

* *Hist. Com. Law*, 155.

limited, because that power can only be lawfully exercised by the monarch in certain prescribed modes and on certain prescribed conditions. The Queen, and she alone, is the depositary of the national power. She, and she alone, is entitled to exercise that power. But in her exercise of it she always acts by the advice and with the consent of certain bodies specified by law.

It is strictly true that, theoretically, the absolute power of the Legislature is as arbitrary in England as in Persia.* There is nothing within the limits that nature has set to legislative action that transcends the power of an Act of Parliament. Such an Act may, as Lord Holt observes, "do several things that look pretty odd; it can make Malta in Europe, and can make a woman a mayor or justice of the peace."† It cannot, however, as he further observes, change a man into a woman or a woman into a man. Within those natural laws to which princes and people must alike submit, the Queen in Parliament can do any act whatever. But the practical difference between the Shah of Persia and our constitutional Queen is, that in the former case the monarch's power is exerted at the unfettered discretion of a single individual; in the latter case, its lawful exercise is directed and controlled by a machinery which more or less adequately represents the existing sentiments of the community.

King a true monarch.

§ 2. We are at the present day so accustomed to think and to speak of the Government of Lord Derby or Lord Palmerston, of Mr. Gladstone or Lord Salisbury, that we almost overlook the Royal Personage whom these statesmen serve. We forget the Queen for the minister. The means, as so often happens, obscure the

* Hallam's *Const. Hist.*, iii. 140.

† Dwarris on *Statutes*, 523.

end; the object limited is lost in the limitation. Yet, whatever may be our mode of speech, any such indistinctness of thought will effectually exclude all clear views of the Constitution. In our political system the Crown always has been and still is the sun. Whatever may be its merits, democracy has no place in English law. There is, as Mr. Hallam has observed,* nothing, absolutely nothing that resembles it in our early books. They derive everything from the Crown, and refer everything to its honour and advantage. Nor is this less true of the modern form of our Constitution than it was of an age when the prerogative was exercised chiefly for the King's personal benefit. The lustre of the triple crown of the United Kingdom is not less brilliant than the lustre of that single crown of England which rested on the brows of our Henries and our Edwards. With us no less than with all our ancestors, ever since England was a nation, the Crown enacts laws; the Crown administers justice; the Crown makes peace and war, and conducts all the affairs of state at home and abroad; the Crown rewards them that have done well, and punishes the evil-doers; the Crown still enjoys the other splendid prerogatives which have at all times graced the diadem of England. "I believe," says Burke,† "that many on the Continent altogether mistake the condition of a King of Great Britain. He is a real King, and not an executive officer. If he will not trouble himself with contemptible details, nor wish to degrade himself by becoming a party in little squabbles, I am far from sure that a King of Great Britain, in whatever concerns him as a King, or indeed as a rational man, who combines the public interest with his personal satisfaction, does not possess a more real, solid, extensive power than

* *Middle Ages*, iii. 152. † *Works*, iv. 388.

the King of France was possessed of before this miserable revolution. The direct power of the King of England is very considerable. His indirect and far more certain power is great indeed. He stands in need of nothing towards dignity, of nothing towards splendour, of nothing towards authority, of nothing at all towards consideration abroad. When was it that a King of England wanted wherewithal to make him respected, courted, or perhaps even feared, in every state in Europe?"

§ 3. The mode by which the English monarchy obtains in practice its limited character is very remarkable. The law places no restriction upon the extent of the Royal power, but rigorously defines the manner in which the several branches of that power may be exercised. In every part of public affairs the expression of the Royal will is conclusive; but in each case the Royal will must be intimated through the appropriate channel. The Royal will in contemplation of law is by no means the mere personal will of the King. It is his official will, enlightened by the advice, and carried into effect through the agency of councillors and ministers recognized by the law and personally responsible both for their advice and for their acts. The King, as the old Saxon laws declare, "ought to do all things duly and by the advice of his chief men." It is not, as Bracton and Fleta* tell us, everything that pleases the Prince, as in the law of Imperial Rome, or that proceeds from the will of the King, that has the power of law; but that which, "after deliberation held upon it and discussion, has been duly determined by the advice of his great men under the sanction of the Royal authority." The will of the King, as another authority has said, is that which is displayed in

Mode of limitation of the monarchy.

* B. i. c. 5.

his court, not in his chamber.* In accordance with this fundamental principle the law has provided special organs by means of which the various functions of Royalty are lawfully exercised. If the King give laws, no other intimation of the Royal will is sufficient for this high purpose than that expressed by him after solemn deliberation in full Parliament. If the King be the fountain of justice, the streams of right must flow under the direction of those sages of the law whose special duty it is to advise the Crown on all such questions. The whole executive authority rests in the King; and for his assistance in affairs of state the law assigns his Privy Council. Every official act must be performed through the agency of some officer, often indeed of several officers, and must be attested in the mode required by law for each such transaction.

These organs of Royalty are all distinct, and none of them is competent to perform the functions of the other. The Council of Justice cannot make the laws that it interprets; the Council of Legislation cannot in any individual case interpret the laws that it has made. Neither of them can administer the laws so made and interpreted, although they may enforce their observance or supervise their execution. However regularly the Royal will may be expressed for one purpose, that expression is insufficient for any other purpose. If the King through his executive servants issue orders which he could properly issue only under judicial advice—if, for example, he direct an arrest by warrant under the sign manual and not by writ from one of his courts—the command so issued is void. In the quaint language of Spanish loyalty, such irregular commands must be "obeyed and not complied with."† Every

* *Voluntas regis in curia lucet non in camera.* 2 Rich. III.

† See Hallam, *Middle Ages*, ii. 25.

mandate of the Crown ought to be received with the most profound respect; but those mandates only which are in strict conformity with law can claim or warrant our submission.

§ 4. We thus see the true meaning of the maxim that the King can do no wrong. It applies to the King in his official character. Every official act of the Crown must be done in the manner prescribed by law. Every such act so done is lawful. Every act done under colour of the Royal authority, but not in the proper manner, is not an official act of the Crown. Such an irregular act may be thought to convey some intimation of the Royal will, but not such an intimation as the law requires or permits subjects to notice. Thus no injury, no legal wrong, can be done by the King, because all his official acts are done in accordance with law, and because no unlawful act can be recognized as an act of the Crown. "*Nihil enim aliud potest rex nisi id solum quod de jure potest.*" *

King can do no wrong.

There is another sense in which this maxim is usually taken. It is construed to mean that there is no remedy for any personal delinquency of the King. But this proposition, although it is true, seems to be distinct from the one now under our consideration. It is one thing to say that no act of a certain person is illegal; it is another thing to say that no illegal act of that person shall bring with it the consequences usually attached to similar acts. This immunity of the King is not peculiar to him. If the law will not provide any remedy for any wrongful act of the King, it is equally true that the ambassador of a foreign prince can in this sense do no wrong. From all

* Bracton, cited in 2 *Steph. Comm.*, 485.

proceedings both civil and criminal an ambassador is in our country absolutely exempt. Although Cromwell hanged a Portuguese envoy for a murder committed during his official residence in England, it is now generally acknowledged that this mode of redress is indefensible. So, too, it has been recently decided that not only is no execution issuable against the goods, and much less the person, of an ambassador, but that no suit whatever can be brought against him.* The same principles apply to any sovereign prince who happens to be personally resident within the jurisdiction of our courts. Even if he be at the same time a subject of the Queen, it is only for acts done by him evidently as a subject that he is liable ; and the presumption is always in favour of his regal character. Immunities similar in kind, although not equally extensive, are in several other cases recognized by the law. A member of Parliament during the session of Parliament, and for some time before and after it, is in all civil cases—and perhaps in some criminal cases—exempt from arrest. The person of a peer is in civil cases at all times sacred and inviolable. No proceedings can be taken in any court other than the High Court of Parliament against any judge for his judicial words or actions. Nor can any words, however slanderous, be called in question which are spoken in his place in Parliament by any member, or in the course of his duty in court by any barrister in pursuance of his instructions.

From these considerations another consequence of great practical importance may be deduced. Since no unlawful act is the act of the Crown, no command to do any such act can be a command of the Crown. No person, therefore, doing any unlawful act under colour of the Royal authority, can shelter himself from the penal or other consequences of

* *The Magdalena Steam Navigation Company v. Martin*, 28 L. J. Q. B. 310.

his act under the protection of that pretended command. No such command is a command of that nature which the law recognizes as binding upon the subject. The person to whom it is given consequently acts at his own peril; and is liable to the Royal displeasure and all its consequences for his breach, if there be any, of the true and real commands of the King.

§ 5. In this requirement for the Royal will of certain exclusive modes of expression, differing in each case according to its circumstances, there is nothing unusual or contrary to the analogies and known principles of other portions of our law. The doctrines of preappointed evidence furnish no inconsiderable part of our daily practice. If a subject desire to marry, he must express his wishes in the manner and at the place and at the time that the law prescribes. If he desire to settle his lands upon his intended wife, he must for this purpose execute a written instrument under seal. If he desire to regulate his affairs in the event of his death, his Will, as it is emphatically termed, is evidenced by a somewhat complex process most rigorously defined. If he have dealings with his neighbours, some of his contracts must be under seal; others, although not requiring the use of a seal, must be in writing; while others require neither of these formalities. In official affairs the same principle is still more distinctly pronounced. No minister of state or other public officer feels bound by a mere casual observation, but requires as the expression of his official will a letter from the department, in other words a deliberate intimation of his purpose written under the full sense of his responsibility and duly recorded in his office for future reference. A judge is not bound by any opinion that, when not on the bench, he may express. Even the observations

Legal analogies to specific expression of Royal will.

which he may make in deciding any case, if they be not essential to his decision, are regarded as extra-judicial and unauthoritative. The confession by an accused person of his guilt is not conclusive against him, but must be corroborated by external evidence. Yet if the same person, when arraigned in open court with all the solemnities that attend a trial, plead guilty, no further proceedings are required to enable the judge to pronounce his sentence.

§ 6. This view of our Constitution serves to explain some portions of our history that have sometimes been disputed or misconstrued. With its assistance we can discern the real character of the contest with the Stuarts, and the different aspects in which the questions then in dispute presented themselves to the opposing parties. At the end of the sixteenth century the conditions under which the Royal powers of legislation could be exercised were sufficiently ascertained, and the independent action of the various courts was established. But in all matters of administration the authority of the King's personal will was not only undisputed, but was daily becoming more pronounced and more inclined to transgress the limits of legislation and judicature. Various circumstances combined in the sixteenth and seventeenth centuries to raise throughout Europe both the powers and the pretensions of Royalty. From these influences England was not free. Henry Tudor was one of the *tres magi* whose state craft was the admiration of their contemporaries. There were also local causes in England which powerfully contributed to the same result. Not more than twenty-nine lay peers, the sole survivors of their fratricidal strife, responded to the parliamentary summons of the victor of Bosworth. His son swept from their places one whole branch of the

Explanation of contest between the Stuarts and Parliament.

spiritual peerage, and swelled his patronage with their spoils. Almost the first measure of King Henry the Seventh was to obtain for his Council more ample powers for the repression of discords that the arm of ordinary justice was too feeble to control. The bulk of the people, harassed and interrupted with long-continued disturbances, joyfully welcomed a strong government, and only saw in every stretch of prerogative a new victory of their champion over lawlessness and oppression. Thus all the powers of the state were brought under the immediate influence of the Crown. The House of Lords was filled with new creations, and the remnants of the old baronage soon found the prudence of siding with a King from whom there was both much to hope and much to fear. The imperfect procedure of that age, more than any dishonesty of the judges, gave to the Crown in all criminal cases a fearful advantage. The ample domains of the Crown, and the forfeited lands of the Church, afforded a ready means of rewarding a faithful servant. The influence which the barons had formerly exerted over the House of Commons passed with their fall almost insensibly to the King.* The great religious parties into which the nation was divided vied with each other to obtain the powerful aid of the Royal support; and when the Church of England was thoroughly established, its bishops became the most zealous partisans of the Crown. The prerogative was carried to no inconsiderable height, yet with the hearty approbation of the great mass of the people, by the great Tudor Queen. On her death, however, her sceptre passed to a successor whose personal qualities were very different.

There were two circumstances that from the outset affected the history of James Stuart and his descendents.

* See Mr. Sanford's *Studies of the Great Rebellion*, c. 1.

His title to the throne of England was one by which, as it has been justly said,* no subject in his dominions could have recovered an acre of ground. In the execution of a power conferred on him by Act of Parliament, Henry the Eighth had made provision for the succession to the throne after the failure of his own descendents. According to his testament, the descendents of his younger sister Mary Brandon were entitled to the throne. According to the ordinary rules of descent, and in the absence of any such instrument, James Stuart, the great grandson of Henry's elder sister Margaret, was the next heir. Sixty eventful years had elapsed since the execution of that will. Political reasons rendered the accession of the Stuart line very desirable, and the descendents of the Duchess of Suffolk had fallen on evil days and evil tongues. But although the testament of Henry the Eighth was tacitly set aside, the persons entitled under it were still living; and the pride of the court could ill endure a defective title. It was, accordingly, the favourite court doctrine that the late King's testament was *ultra vires;* that Parliament had no power to alter the succession; that the descent of the Crown was immutably fixed, and could not be affected by any human power. Nor were there wanting authorities, as we shall presently see, to support this view, or to uphold the Common Law against any statutory derogation. Thus the doctrine of indefeasible prerogative and succession was settled as the shibboleth of court favour and preferment; and the consciousness of weakness led to its constant and exaggerated inculcation. While the court lawyers found it their interest to support this doctrine, the court divines were not backward in lending to it their aid.

* Hallam's *Const. Hist.*, i. 289.

They hastened to account for the legal proposition which the lawyers had laid down. They supplied a theory for the statement of legal fact. The Royal right was indefeasible because it was divine. The King was the viceroy of the Almighty upon earth.. Perhaps, indeed, he was something more. The apotheosis of the Cæsars might have suggested the apotheosis of the Stuarts.* To King James, persecuted from his childhood by the overbearing and plain-spoken Scottish clergy, this change in the ecclesiastical tone was inexpressibly grateful. The insolent presbyters of Edinburgh † had called him opprobrious names from their pulpits, and in his palace ; had spoken of him as one possessed of seven devils ; and had publicly prayed for his hardness of heart. The polished prelates at Hampton Court listened on their knees to the words of wisdom that fell from the Royal lips ; and, like the flatterers of Herod, murmured that it was the voice of a God and not of a man.‡ It was little wonder, then, that "no bishop no king" became a received maxim with the Stuarts. In this state of political fetichism the old doctrines of a limited prerogative were quickly exploded. The laws were the King's laws ; the courts were the King's courts. Affairs of state were obviously the King's exclusive concern. What the King had given the King might take away. What the King commanded was without hesitation to be done. It was not only unlawful but it was impious to disobey, far more to resist, the most tyrannical mandate. These pretensions, not unsupported by lawyers and judges and warmly applauded by bishops and Oxford divines, coloured the whole history

* See Spence's *Equit. Jur.* 125, note *e*.

† See the authorities cited in Buckle's *History of Civilization*, ii. 253, *et seq*.

‡ Gardiner's *History of England*, i. 172.

of Charles the First. Over and over again that unfortunate King stated his personal order as a sufficient justification for the conduct of his servants. He told the Commons that everything the Duke of Buckingham had done was by his express order. He told the Lords that the informations laid by his Attorney-General before them against the Five Members were laid by his personal command. He persuaded the judges that a warrant expressing no other reason for arrest than the King's special command was a sufficient ground for imprisonment. He had no scruple in attempting personally to arrest Pym and Hampden and his other leading opponents. Even still to general readers of history the condemnation of Lord Strafford for levying war against the King, though he acted under the King's orders and for the King's benefit, seems not ludicrous only because it is horrible. Yet the judges were unanimously of opinion that the facts which were found to have been proved amounted to treason, and Strafford died by no undeserved fate.* In all these cases, and indeed all through his troubled reign, the King's difficulties were caused by the fatal confusion between his personal and his official will.

§ 7. By this principle we may also discover the real nature of the difference between the Whig and the Tory parties. I need not say how difficult it is to state precisely this distinction. The usual statement that the Tories favoured the prerogative, while the Whigs were lovers of freedom, although to some extent true, is very indistinct. On the other side, the statement that the Whigs advocated all liberal measures and that the Tories opposed every change, although it is sufficiently

Difference between Whigs and Tories.

* Hallam's *Const. Hist.*, ii. 107.

distinct, can hardly be said to be true. Burke found it necessary to appeal to the memories of the great Revolution leaders against the new Whigs of his day. Earl Stanhope* urges an ingenious comparison to show that the Whigs of 1715 and the Tories of 1832 held precisely similar principles. The true distinction between these great parties related, as I think, to the character of the Royal will in matters of administration. Both parties entirely agreed that the King was the head of the state. Both parties equally agreed that the powers of the King were fixed by law. The Tories, however, held that in state affairs the personal will of the King was within the limits of law the determining principle. The Whigs, on the other hand, insisted that in such cases the King's will was his official will, formed upon consultation with his confidential servants, in whose selection the Royal will was also to be guided not by any personal feelings but by their acceptability to Parliament. It was at the great contest on the Exclusion Bill that the differences between the two parties first found an articulate utterance. The advocates of that measure petitioned the King to convene a Parliament, and to govern by its advice. Its opponents presented counter petitions, declaring their abhorrence of the detestable intrusion upon the exercise of the Royal discretion. For a time the names of Petitioners and of Abhorrers, or of Brummagems and of Tantivies, marked the principles of the opposing parties, or the classes from which they were derived. But as party spirit grew fiercer, other names were found. Nothing English could sufficiently express their mutual hate. The jolly, hard-drinking, fox-hunting Cavalier found for his opponent an appropriate nickname in the covenanting Scotch drovers, as sour as the whey which was their favourite

* *History of England*, i. 7.

drink. Their more acute opponents retaliated with a name which combined all the ideas most odious to the English mind—those, namely, of an Irishman, a papist, and a thief. Such felicitous appellations could not fail to succeed. They survived long after the dispute of the Exclusion Bill had died away. They survived, however, not only from their inherent vitality, but because the principle out of which they had arisen was still unsettled, and still dominant. The difference indeed was fundamental. It was essential to ascertain how the national policy should be determined, before it could be satisfactorily arranged what, in any given subject, that national policy ought to be.

While this characteristic difference existed, the parties still continued. The dispute, which had really commenced under Elizabeth, and had under Charles the First passed for a time from a mere functional derangement into a change in the actual structure of the Constitution, has lasted almost to our own day. It was far from being settled by the Revolution, as the disputes with his Parliament which embittered William's life too well attested. It is to the fortunate incapacity of the first two Hanoverian Kings and their indifference to English affairs that the settlement of true constitutional principles on this subject is chiefly due. As these Kings owed in effect their throne to the Whigs, Whig principles became fashionable in their courts. It could not be expected that the Royal smile should beam graciously on the advocates of doctrines which branded the reigning King as usurping and accursed. The old path to Royal favour and preferment thus became not only useless, but even dangerous ; and accordingly expectant clergy and hungry placemen and flattering courtiers ceased to chatter about divine right and indefeasible prerogative. This change operated in two ways. Not only were Whig principles favoured by the court, but the

Tories found themselves in an embarrassing opposition. The theory of intense devotion to the Crown has always required for its development the full sunshine of Royal favour, and has always been considerably modified in the cold shade of opposition. The divines whose weekly discourses never failed to inculcate submission to Nero, as long as that virtue was to be exercised by others, found reason to reconsider their opinions at the first approach to their own order of a tyranny incomparably gentler than that of Nero. When James I. committed to prison some Puritan divines, for presenting to him a respectful petition, the wisdom of Solomon was apparent to the Church.* When James II. proceeded, not by arbitrary arrest but by due course of law, for the very same offence, against the seven bishops, treason became a virtue. In like manner the loyalty of the Cavaliers was a loyalty to their own opinions.† When the King was on their side, when their enemies were his enemies, obedience was an easy and a pleasant duty. But a Whig King was a possibility for which this theory had made no provision. Against such an anomaly the weapons which the Whigs had wielded so successfully might be used. Accordingly, even in the reign of Anne, Lord Rochester, himself a chief leader of the Tories, made, when it suited his purpose, a public avowal of the purest Whigism.‡ A few years afterwards, under the command of Shippen and Wyndham, the Whig doctrines became the favourite commonplaces of the Tory opposition. Nearly half a century thus spent did much to familiarize the public mind with the principles upon which Constitutional Government is formed. But when all hope and all danger from the Stuarts had alike passed away,

* See Hallam's *Const. Hist.*, i. 290.

† See Lord Macaulay's *History of England*, ii. 392.

‡ 6 *Parl. Hist.* 972, and see Hallam's *Const. Hist.*, iii. 232.

when the national pride was gratified by the glorious administration of the elder Pitt, and when a new King arose whose native country was England, whose native tongue was the English tongue, whose habits and sympathies were English, whose sole lesson, earnestly inculcated and eagerly learned, was the precept "Be a King, George," and whose unceasing policy was to free himself, in the spirit of that precept, from that control of powerful servants under which his grandfather had chafed in vain, a great reaction ensued. For many years the King's friends formed a powerful party, and to the end of his active life George the Third took a leading part in the business of administration. So late as the reign of George the Fourth the personal favour of the King was regarded as indispensable to the success of any ministry. Under his brother in 1834 the last effort of the monarch to "be a king" was unsuccessfully made. Owing doubtless in part to the sex of Her Majesty, in part to the tact and prudence of those nearest to her throne, and in part to the successful working of Constitutional Government and the more correct appreciation of its principles, the doctrine of our Constitution in this respect may be now regarded as definitely settled.

We can thus account for the apparent inconsistencies in Whig and Tory doctrines. The distinctions which were founded upon the various questions of political or of social reform with which these parties seem to be connected were in reality only cross-divisions. The cardinal principle of Toryism, says Mr. Hallam,* "is that the King ought to exercise all his lawful prerogatives without the interference or unsolicited advice even of Parliament, much less of the people." The opposite view, as I have said, was supported

Const. Hist., ii. 439.

by the Whigs.* But those who were agreed on either side of this great question were far from unanimous on all other political matters. There was nothing to prevent men who differed as to the general mode of determining the national policy from agreeing as to the substance of that policy in any particular case. There was nothing to prevent men who agreed upon any given political question from differing as to the general principles of administration. It happened indeed that the towns were the strongholds of the Whigs, while the country squires and the country clergy were devoted to the Crown. Hence the original basis of the combination tended to give a colouring to their opinions in other respects. But many good Whigs might well doubt the propriety of Catholic Emancipation; and many territorial magnates might look with little favour on the destruction of the rotten boroughs or the still more odious repeal of the corn laws. On the other hand, the intense veneration that the English feel towards their King was shared by many an ardent abolitionist and many a staunch freetrader. Even the great Chatham himself, so liberal in his views, so hostile to secret influence, so proud to other men, prostrated himself with almost eastern abasement before the presence of Royalty.

§ 8. If it be asked what is the form under which the difference of our modern and our ancient Constitution presents itself, the answer must be sought in the laws which regulate organic development. The changes which have taken place in our Constitution are the results of the natural process of evolution. Our Government, like that of most other European countries, was originally vested in a King in Council. The

Constitution is governed by law of evolution.

* See Sir G. C. Lewis's *Administrations of Great Britain*, 88, *note*, and the passage from Mr. Allen's article in the *Edinburgh Review* there quoted.

King personally transacted every description of business, legislative, judicial, and administrative. In every description of business his councils gave him their assistance. But these councils gradually presented numerous differentiations, and a series of organs distinct but mutually dependent were ultimately developed. Each organ in this matured system, as has been already seen, has its own function. Each function finds its appropriate organ. The function of legislation is no longer confused with the executive function; the judiciary is distinct from both. Within each of these great divisions, various subdivisions are included. The legislature comprises its two Houses. The courts of justice are very numerous; the different departments of the public service are still more numerous; and each of them has its separate organization. The efficacy of the system and the complexity of its organization proceed simultaneously, since their relation is causal.

In strong contrast with this spontaneous evolution, in which a homogeneous and simple body is by a series of differentiations and integrations transmuted into a heterogeneous and complex body, stands the system of Imperialism. It belongs to a lower political type than the Constitution of England. In most cases it has been formed by the inverse process to that of ours. Its method is not progress, but regress. In the great European model of such governments, the empire of the Cæsars, the functions of at least seven independent and distinct offices were absorbed into the monarchical system, and assimilated to its nature.* Augustus did not create for himself any new dignity; but he carefully brought together all the great offices of the republic—the military command of the Imperator, the moral dignity of the Princeps, the civil

* See Dean Merivale's *History of the Romans under the Empire*, c. 32.

power of the Consulate, both in the city and the provinces, the vast and various authority of the Pro-consulate of the Censure and of the Tribunate, the religious headship of the Supreme Pontificate. All these republican authorities he freed from restriction, whether arising from the period of enjoyment or from the persons who were to share them. Thus a simple despotism for a great Empire was constructed out of the small but highly-organized city state. Within its own limits and according to its own type that despotism was in time elaborately organized. But however complete its administrative arrangements may have been, it retained to the last its original structural simplicity. The Emperor remained actually and not merely typically the Sovereign, and no further organs were provided for the expression of the Imperial will. I need not point out how a similar process has taken place in France, and how all attempts at national organization have hitherto failed to permanently produce in that country any higher model of government than one constructed on the type of that of the Cæsars.

CHAPTER II.

THE LEGAL EXPRESSION OF THE ROYAL WILL IN LEGISLATION.

§ 1. It is not easy for us, so altered are our circumstances, to enter into the feelings with which our ancestors regarded the Common Law. To them those "ancient judgments of the just"* represented the immemorial customs of their race, the old familiar principles under which they and their fathers had lived and by which their property and their security were assured. This traditionary law was rendered still dearer to them by the subtle innovations both of the Norman lawyers in favour of the Crown, and of the canonists in favour of the Church. On the one side the forest laws or the laws of the Court of Chivalry or other peculiar courts infringed upon the free customs of the land; on the other side the Church unceasingly strove to extend its own system and to introduce into general practice the doctrines of the Civil Law. But however willing the elder jurists of our country were to derive reflected light from Roman jurisprudence, they knew too well the political tendencies of the lawyers of the Antonines and of the codes of Theodosius and Justinian to admit for an instant the binding authority of that

Affection of our ancestors for the Common Law.

* Bracton.

legislation. The unlearned but free-born tenants of the Crown had no idea of submitting to a heavier yoke than their fathers were accustomed to bear; and in their general contentment with the present and their ignorance of the cause of their comparative prosperity resolutely resisted every change. Thus we find the English when oppressed by Norman exactions clamouring for the restoration of the good laws of King Edward. Thus we find the sturdy refusal of the barons at Merton to permit on a question of status the laws of England to be changed. Thus we know that in the times of the Third Edward and of his grandson the addition of a new* law was regarded as a matter of the gravest nature, not to be lightly asked or heedlessly granted. At a still later period, the language of our lawyers towards their loved jurisprudence breathes a spirit of the deepest reverence and of the tenderest affection. The Common Law, as Lord Coke tells us,† is the artificial perfection of reason. It is synonymous with justice and right. It is the golden mete wand and measure to try the causes of his subjects, and it protects His Majesty in safety and peace. It is the best birthright of the nobles, and the principal royalty and right of the Crown. It is the surest sanctuary that a man can take, and the strongest fortress to protect the weakest of all. It is the safest and faithfulest pillar and bulwark of the commonweal, which although sometimes altered or perverted hath ever been with great applause for avoiding of many mischiefs restored again. It is a nursing father that corrects only what is amiss and preserves the rest. It is the best and most common birthright that the subject has for the safeguard, not only of his goods lands and revenues, but of his wife and children.

* Hallam, *Middle Ages*, iii. 49.

† See 2 *Inst.* 56, 98; 3 *Rep.* preface xviii.; 12 *Rep.* 76.

§ 2. It may well be thought that no part of this fundamental system of law was left for an instant at the discretion of the Crown. It was, as we shall presently see, doubtful whether any statute could contradict or expressly repeal these national customs. Certain it was that, if a statute had such power, nothing but the clearest words could enable it to derogate in the least particular from the Common Law. But within the limits of the Common Law, and by way of supplement to it, the Royal authority for legislation might be exerted. In what form this legislative will must be expressed, was in the earlier period of our history by no means clear. Unquestionably this prerogative might be exercised by the King with the advice of his great council. But ought not the King's proclamations on his own Royal authority, and with the assistance of his ordinary council or his executive officers, to be binding upon his subjects? No lawyer ever contended that the King might of his own mere motion alter any part of the Common Law or make any law inconsistent with its provisions. No Plantagenet or Tudor ever thought that he could reduce the number of jurors from twelve to four, or that he could enlarge the widow's dower to a moiety of her husband's freehold estates. When Henry the Eighth himself granted a manor in Essex to a man and his heirs male, it was judicially decided that such a grant was bad, because the King could not create a course of inheritance unknown to the law.* The House of Lords has recently decided † that for the like reason the like limitation of a peerage does not create a descendible dignity. When Queen Elizabeth desired the patronage of an office in which a freehold had been already granted, she

Statutes by proclamation.

* Plowden, 335.

† *Wilkes Claim of Peerage*, L. R. 4 H. L. 126.

was fain to admit * that the rights of the tenant were beyond her control. But it has been usual from ancient times that the Crown should issue proclamations to enforce the law; and thus the transition was easy and almost inevitable to proclamations to amend the law. When sessions of Parliament were infrequent and short, the legislative authority of the Crown was felt to be a great practical convenience; accordingly in such times, when the lines of separation were not clearly marked, a Royal proclamation on a novel subject would seldom be disputed, and would, if disputed, be generally upheld. But as the development of the country became more complete, this assumption of legislative functions by the executive attracted more attention. It was found that these proclamations were not only a dangerous usurpation of legislative power, but also were an indirect method of taxation. Offences were often created for the sale of the licence, and thus liberty was impaired and at the same time money was irregularly received. At length a celebrated case was decided which finally placed beyond all doubt the inability of the Crown, that is the Crown in its executive character, to make any new law.

In the year 1610 King James the First and his Parliament were engaged in the discussion of what was then called "The Great Contract." This negotiation related to the purchase from the Crown of its proprietary rights under the old system of military tenures. The Commons were naturally anxious to include in the bargain the redress of some of the more pressing grievances of which they had then to complain; and the King was not reluctant to listen to the suggestion of such important customers. Accordingly an address from the House of

* Anderson's *Reports*, 154.

Commons * was presented to His Majesty, setting forth among other grievances the recent and manifest increase of proclamations during late years, and their extension not only to the liberty of the subject, but to his property and his industry. It was represented that some of these proclamations made positive innovations on the law; that propositions deliberately rejected in Parliament were during its prorogation established by proclamation; that by the same means punishments were inflicted before lawful trial and conviction; that new penalties were created, and jurisdiction given to courts of arbitrary discretion, which discretion was often wrongly exercised; and that the wrong done by an illegal proclamation was often put forward as a precedent to countenance and warrant further illegalities. What was still more alarming, books were published ascribing to proclamations an authority previously unknown; and all the proclamations issued since the King's accession had been carefully collected into one volume and were printed in the same manner as Acts of Parliament. Such a proceeding, as the Commons justly argued, "seemeth to imply a purpose to give these proclamations more reputation and more establishment than heretofore they have had." These "mournings of the dove," as Bacon,† who presented the address, called them, were not ungraciously received. The King did not deny that sufficient care had not been shown in his former proclamations,‡ but asserted his general right to issue proclamations in cases of emergency when Parliament was not in session and the grievance would consequently remain without remedy. But he promised to consult his council and the judges upon the subject, and that then he would "do right to them." In accordance with this promise,

* 2 *State Trials*. 519. † *Ib.*, 534.

‡ Gardiner's *History of England*, i. 474.

Lord Coke, then Chief Justice of the King's Bench, was summoned to attend the Privy Council ; and was there asked whether the King might by his proclamation prohibit new buildings in and around London, and the making of starch of wheat. Coke, although strongly pressed for an immediate opinion, insisted upon time for consultation with the other judges ; and ultimately with some difficulty the question was referred to him, Chief Justice Fleming, Chief Baron Tanfield, and Baron Altham. The result will best be stated in the words of the great Reporter himself : * " In the same term it was resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference between the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before ; for then he may alter the law of the land by his proclamation in a high point, for if he may create an offence where none is, upon that ensues fine and imprisonment. Also, the law of England is divided into three parts, Common Law, Statute Law, and Custom ; but the King's proclamation is none of them. Also, *Malum aut est malum in se aut prohibitum ;* that which is against common law is *malum in se ; malum prohibitum* is such an offence as is prohibited by Act of Parliament, and not by proclamation. Also, it was resolved that the King hath no prerogative but that which the law of the land allows him. But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws and do not offend them upon punishment to be inflicted by the law, et cetera. Lastly, if the offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it punishable there ; and after this resolution no proclamation imposing fine and imprisonment was afterwards made."

* 12 *Rep.* 76.

Notwithstanding Lord Coke's jubilant comment, his ruling did not altogether banish proclamations. They were freely used during the eleven years in which Charles the First attempted to govern England by his mere personal will. In the reign of Charles the Second they are of frequent occurrence.* Sir Mathew Hale speaks cautiously of their illegality in matters of trade and taxation. But no serious grievance can have arisen from them at this period, for no mention is made of them in the black catalogue of the Declaration of Rights, even though that list is not exclusively confined to James's misdoings. The last time that the question was mooted seems to have been in 1766.† It was thought expedient by Lord Chatham's administration, in consequence of successive failures of the harvest, to prohibit the exportation of wheat. This measure met with general concurrence at the time; and would have readily been sanctioned by Parliament, were it not for the extraordinary defence that Lord Northington and Lord Camden set up in its behalf. The great legal champion of popular freedom, the destroyer of general warrants, the liberal judge whom foreigners used to visit as one of the sights of London,‡ insisted, in effect, that the whole proceeding was perfectly lawful and within the limits of Royal authority. This was to contend that the Crown had the power both to suspend, not only the Bill of Rights, but the Common Law itself, and also to create by its proclamation a new offence. Such a proposition met with no sympathy from any quarter; and an Act of Parliament§ was passed which distinctly recognized the illegal character of the proceeding, and indemnified not only those who

* Amos, *Eng. Const.*, p. 25.

† Massey, *Hist. of Eng.*, i. 298; 16 *Parl. Hist.*, 251.

‡ See Lord Campbell's *Lives of the Chancellors*, c. 143.

§ 7 Geo. III., c. 7.

acted in obedience to this proclamation but those who had advised it.

§ 3. Nearly akin, both in their principles and their origin, to the doctrine of Proclamations were the still more famous prerogatives of Suspension and Dispension. While the supremacy of the Common Law was fully recognized, it might still be thought that the statutes were the King's laws; that the power which created them had the power to repeal them, or to suspend their operation, or to except from their operation some particular person. The entire repeal of a law was, indeed, a fit subject for the consideration of that assembly by whose authority it was enacted. But at a time when the meetings of Parliament were rare and brief, and when perhaps there was but little of the knowledge or the skill that legislation requires, if a statute worked ill, or if some unforeseen emergency arose, the interposition of the Executive, and the suspension of the law that was thus producing unexpected mischief until there was time for reconsideration of the question, were often found to be convenient. The dispensing power of the Crown, its power to authorize some specified individual to do some forbidden act, depended upon somewhat different considerations. The Crown could pardon the offence when it was committed. It seemed therefore a simple and expeditious course to supersede the necessity of pardon, and to render lawful in its execution that action the penal consequences of which, if it were performed, might be averted. Most of these penal consequences, too, were, in our earlier legislation, directly beneficial to the Crown. The King might, therefore, waive the penalty which was inflicted for his own advantage, and decline to avail himself of such a source of gain and of the services of any informer. Accordingly

Suspending and dispensing powers.

those powers, which were said to have been first exerted by Henry the Third in imitation of analogous powers claimed and exercised by the See of Rome, were freely used during our earlier history. They have been in express terms abolished by the Bill of Rights, and have, therefore, for us, merely an historical interest. Yet the controversy that once raged concerning them was so bitter, and its effects are even still so apparent in our historians, that a few words on this faded flower of the prerogative may not be misplaced.

The occasion which brought prominently into notice the exercise of these powers was the attempt made by the last two Stuart kings to set aside the religious disabilities which pressed hard upon Roman Catholics and Dissenters. But the Test Act was the great triumph of the Whig party, and was regarded with hardly less affection by those Tories who were distracted between the conflicting claims of their Church and their King. It was indeed supported at that time with fervent zeal by a large majority of the English people ; and accordingly that exercise of prerogative by which this favourite measure was insidiously threatened has become almost synonymous with all that is tyrannical. The suppression of that prerogative was the great achievement of the Revolution, and the iniquity of the fallen idol is thus one of the most cherished traditions of the Whigs. In the minds of the Tories that prerogative was associated with that unnatural dissension between the Church and the Crown which led to the exile of their rightful King. The dispensing power has thus had bitter enemies and no friends. Even after the lapse of nearly two centuries the Whig historians of the present day show all the spirit of their predecessors. The ponderous jocosity of Lord Campbell and the fiery invective of Lord Macaulay* are insufficient

* Lord Macaulay uses very different language when the dispensing sovereign was King William, and the Act in question was Scotch. See *Hist.*, iii. 248.

to express the hatred and contempt of these distinguished writers for the corrupt or ignorant judges who prostituted their high calling by a flagrantly false and fraudulent exposition of the law. With calmer judgment and profounder learning Mr. Hallam* is content with the cautious observation that "it was by no means evident that the decision in Sir Edward Hale's case was against law." They are indeed quite different questions whether grounds of public expedience required a change in the law, and whether the judge's exposition of the law as it then stood, however obnoxious or injurious the law so explained might be, were or were not correct. As to the former question there is now no room for doubt; as to the latter, it is neither just nor conducive to a true understanding of history to denounce men as fools or knaves because they told an unwelcome truth. Little needs be said as to the right of Suspension. The main contest arose on the Dispensing power. If that power fell, it of course brought with it the much greater power which the former assumed prerogative claimed. On two occasions Charles the Second suspended without receiving any remonstrance the operation of statutes.† One of these statutes was the Navigation Act; and in matters relating to trade and navigation the prerogative was more than usually vague and indefinite. The other occasion related to the regulation of vehicles and some other matters of minor importance. But his celebrated Declaration of Indulgence met with a very different reception. He found that an exercise of power which might pass unchallenged in the case of ships and of cart-wheels would not be endured in a matter of religion. Accordingly in 1672 he cancelled with his own hand in full Parliament his second Declaration. Lord Macaulay‡

* *Const. Hist.*, iii. 62. † Amos, *Eng. Const.*, 22.

‡ *History of England*, ii. 81.

dwells on this proceeding as a complete and irrevocable abandonment of the right. But both the complaint of Parliament and the Declaration itself related not to the general prerogative, but only to its exercise in that particular instance. All that the precedent of 1672 assumed to establish was that in matters ecclesiastical the suspending power did not apply. Even if Charles's revocation of his act were more liberally construed, such a construction would afford no legal ground for the permanent derogation of the prerogative. It was, as I have said, doubtful whether any part of the prerogative could even by a statute be lawfully diminished. The mere resolution of the House of Commons could not make the exercise of the disputed power either lawful or unlawful. If then the King from financial or other reasons judged it prudent on that occasion to forego his claim, it would not even at the present day be regarded as a renunciation so solemn and so conclusive that no lawyer could venture again to assert the existence of the right. Nothing but an Act of Parliament expressly naming the Crown, or the decision of a court of competent jurisdiction, could defeat the prerogative ; and no such act or decision was obtained while Charles the Second reigned.

Whatever might be said of the suspending power, the case of the dispensing power stood upon different grounds. In this matter James the Second took the fair and legitimate course. He desired to obtain a legal decision upon the extent of his prerogative. Whatever we may think of his motives or of the methods he adopted to secure a majority of the Court, there is no doubt that the Court of King's Bench was the proper tribunal to determine the matter of right. Nor is there any reason to object to the course taken to raise the question. The penalty was deliberately incurred on the strength of a dispensation, and

an action to recover the penalty was brought by a friendly plaintiff. Where it has been desirable quickly to obtain a decision, many such actions have been thus brought both before and since this case. It is said that the counsel for the plaintiff purposely argued feebly: but even if the charge be true, the case according to the Whig lawyers was already so clear that the incompetence or the treachery of its advocates could have been of little importance.

Those who know only the Whig view of the question will perhaps be surprised at the strength of the authorities on the other side.* In the reign of Henry the Seventh it was solemnly determined by all the judges of England in the Exchequer Chamber that, although an Act of Parliament forbade any person from holding the office of sheriff for more than a year, and enacted that no clause of *non obstante* in the grant should prevent the operation of the act, yet a grant of a shrievalty for life, if it contained such a clause, was valid. The authority of this case was recognized by Fitzherbert, by Plowden, and by Coke. It was also cited with approbation by all the judges in Calvin's case. It was supported by constant practice. In the case of *Thomas v. Sorrell* † it was distinctly recognized as the leading authority on the subject of this "dark learning," and its principles were confirmed and followed in that case in the reign of Charles the Second by the Exchequer Chamber. In the latter case, which is still for some purposes cited as a leading authority, the subject was elaborately discussed in the judgment of Chief Justice Vaughan, the same great judge to whose judgment in Bushell's case the independence of juries is due. It was there decided that a privilege granted to the Company of Vintners

* The authorities are collected in a pamphlet by the Chief Justice, Sir Edward Herbert, 11 *State Trials*, 1251.

† Vaughan's *Reports*, 330.

enabling all their freemen to sell wines within certain localities generally interdicted, *non obstante* a particular statute, was a legal dispensation from that statute and a protection to any freeman of the company from its penalties. In addition to these legal authorities, there was an ample recognition of the dispensing power by the House of Commons in the time of Henry the Fourth. There was also (what perhaps was of greater weight) the formal admission by Sergeant Glanville, himself a great authority on such subjects, and then speaking in the name and in the presence of the House of Commons at a conference between the two Houses in the Painted-chamber on the Petition of Right. On that occasion, with reference to statutes prohibiting under penalties actions otherwise innocent, it was acknowledged to be "in His Majesty's absolute and undoubted power to grant dispensations to particular persons with the clauses of *non obstante* to do as they might have done before the passing of such statutes:" but it was insisted that "over the Common Law and our statutes incorporate with that law there is no trust in the King's sovereign power or prerogative royal to enable him to dispense with them." Lastly it is remarkable that the Declaration of Rights itself, while it condemned absolutely as illegal the suspending power, limited its denunciation of the dispensing power to that power "as it hath been assumed and exercised of late." So far was the Convention Parliament from denying the legality of a practice on which no small amount of property had been granted that, when two years afterwards the party of the Revolution emboldened by success ventured wholly to abolish a prerogative which the country had long outgrown, a proviso was inserted to save all prior charters, grants, and pardons.*

* 1 Wm. & M., ses. 2, c. 2, s. 13. See also the case of Eton College, Broom's *Const. Law*, 505.

§ 4. It thus appears that according to the true theory of our Constitution the King cannot otherwise than with the sanction of Parliament make a new law, or alter or prevent the operation of any existing statute. Still less could he at any time have interfered with the Common Law. Even in the worst times that precious treasury of the subject's liberties has been held sacred. When the Reformation Parliament, in the excess of its devotion to its imperious King, gave by a statute to his proclamations the force of law, it was careful to except from these proclamations and the penalties annexed to them all matters that pertained to the Common Law. When James the Second desired to execute by martial law a military deserter, Chief Justice Herbert, the same judge who for his decision in Sir Edward Hale's case incurred such deep and such lasting odium, decided,* true to his principles, that the King had no power to dispense with a law that was coeval with the monarchy. It was indeed more than doubtful whether even Parliament itself is competent to derogate from that fundamental part of our legal system. In "Doctor and Student"† it is laid down that a "statute directly contrary to the law of God is void." Lord Coke declared that "the Common Law doth control Acts of Parliament and adjudge them when against common right to be void." Lord Chief Justice Hobart insists that an Act of Parliament is void if it be made against natural equity.‡ Even Lord Holt remarked that the observation above cited of Lord Coke was "not at all extravagant and was a very true saying."§ Lord Mansfield, when Solicitor-General, did not hesitate to say (*in arguendo*) that the Common Law that works itself pure by rules drawn from the fountain of Justice is for this reason superior to an Act

Can a statute alter the Common Law?

* R. v. Wm. Beal, 3 Mod., 124. See also Lord Campbell's *Chief Justices*, ii. 91. † C. 6. ‡ *Hob. Rep.* 14. § 2 Wil. 351.

of Parliament.* These sages of the law have left us examples of what in their view a statute is impotent to command. Parliament, they tell us, may not permit a man to commit adultery, or forbid that even in extreme necessity alms should be given, or make a man a judge in his own cause. An Act passed in the ninth year of Henry the Fourth commanding all Irish people to depart the realm and go into Ireland before the Feast of the Nativity of the Blessed Lady, upon pain of death, was, according to Lord Coke, "absolutely *in terrorem* and utterly against law." †

We have, however, a distinct legislative recognition of Parliamentary supremacy. It was contended that the Royal prerogatives being part of the Common Law were inalterable by any statute: that no act done by the reigning King in derogation of his Common Law rights could bind either him or his successors: that the succession to the Crown rested upon this firm basis, and that no Act of Parliament could bar the sacred right of the House of Stuart to the Crown and the undiminished power of their ancestors. Such views involved at one time no small amount of actual danger. A statute ‡ accordingly was passed by which the deliberate denial of the authority of the King in Parliament to change the succession is rendered, if made in writing or in print, treasonable; or if it be made in preaching teaching or advised speaking, it brings with it the penal consequences of a premunire. In 1764 at the commencement of the unhappy struggle with America the elder Pitt vehemently protested against the legality of the attempt to tax the colonies. In support of his leader's doctrines Lord Camden insisted in the House of Lords, not indeed judicially but in a set speech and with all the weight of his judicial authority,§ that it was idle to consider the particulars of a

* 1 Atk. 33. † 12 *Rep.* 76. ‡ 6 Anne, c. 7. See also 13 Eliz., c. 1.
§ Lord Campbell's *Lives of the Chancellors*, c. 143.

bill "the very existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of our Constitution." It was doubtless this formidable revival of an exploded doctrine* and not any idle feeling of offended dignity that led the more thoughtful part at least of Lord Rockingham's ministry to pass simultaneously with the Repeal of the Stamp Act the famous Declaratory Act in which the power of the Imperial Parliament was emphatically asserted.

It is now universally conceded that the authority of Parliament in matters of legislation is unlimited. Parliament cannot indeed make an unjust or wicked action to be other than unjust or wicked: but it can make such an action not illegal. It cannot make murder or any other crime lawful, for such an attempt would involve a contradiction in terms: but it can except any given act from the definition of murder.† If in such a case there should be room for doubt, the Court would earnestly struggle not to attribute such a meaning to the legislature. But when the meaning is clear, it is the duty of the Court not to question the wisdom of the statute but to obey its commands. When, as Blackstone observes, "some collateral matter arises out of the general words and happens to be unreasonable, the judges are in decency to conclude that this consequence was not foreseen by the Parliament, and are at liberty to expound the statute by equity, and only *quoad hoc* to disregard it." Experience, too, has shown that the most satisfactory mode of curing bad legislation is to allow it full operation. Its mischievous results supply at once its natural retribution and its surest chance of remedy.

* Massey's *Hist. of Eng.*, i. 260. † See 17 *Vinc's Abrid.* 60.

§ 5. It is then settled that the King has power to make new laws, and to alter or repeal old laws, whether such old laws be statutes or part of the Common Law; that there is no legal limit to his discretion in this respect, and that this great authority is exercisable in Parliament and not otherwise. But although at no period of our history did the mere personal declaration of the Royal will amount to law, the relation of the King to his Council of Legislation has undergone several remarkable changes. Even at the present day this relation is by no means duly appreciated. We hear constantly of the Royal Veto, of its obsolete character, and of the danger that its revival might produce. It is assumed that the power of legislation resides in the council; and that the sovereign has merely a negative control on its deliberations, which power however he is bound not to exercise. Such a doctrine is altogether inconsistent with a right understanding of our Constitution. The very use of the term "veto" suggests a false analogy. There is nothing in common between the refusal of our King to add to or to alter the law, and the power of a Roman Tribune to prevent in a particular instance the application of an existing law. Every Act of Parliament bears on its very front the mark of its origin. It is "enacted by the Queen's Most Excellent Majesty." It is in the Crown, and not in the body which the law assigns as the assistants and advisers of the Crown, that our Constitution places this right. It is the King, as the old Year Book* asserts, that "makes the laws by the assent of the peers, &c., and not the peers and the commune." The power of legislation resides in Queen Victoria no less than it resided in William the Norman; but the conditions under which that power is exercised are indeed very different.

The King in Parliament legislates.

* *Y. B.* 23 Edw. III. 36, cited in 1 Spence's *Eq. Jur.* 125 *note*.

§ 6. Several distinct stages may be traced in the exercise of the Royal power of legislation. In the earlier periods of our history both the subjects of legislation and the mode of dealing with them seem to have rested with the King and his immediate advisers. In some cases, as we have seen, the Royal proclamation was sufficient to supplement, though not to contradict, the Common Law. When the matter was important or disputed, the question was generally laid before *Commune Concilium* and its concurrence obtained. But the proceedings at these councils were very different from that order of parliamentary arrangement with which we are familiar. The King in person presided in his council, prepared subjects for its consideration and shared in its deliberations. Bracton* speaks of the authority of the King as a condition precedent to that action of his council which resulted in law. So late as the time of Edward the First† the initiative of legislation seems to have been freely if not invariably exercised by the King. In all the extant laws of the Anglo-Norman Kings the language is that of the Royal Legislator alone.‡ Not a few of these documents bear the form of charters. This appears indeed to have been the usual and regular form of laws importing a concession of prerogative by the Crown.§ It seems to have been supposed that Acts which affected the prerogative, especially if they were for the relief of the subject, required no further confirmation. Such were the Statutes of Escheators (29 Ed. I.) which related to lands taken into the King's hands upon inquisitions held under

Legislation in council.

* Legis vigorem habet quicquid de consilio et consensu magnatum et rei publicæ communi sponsione auctoritate regis sive principis præcedente juste fuerit definitum et approbatum.—Lib. i. c. 1.

† Hallam's *Middle Ages*, iii. 48.

‡ 1 Spence's *Equit. Jur.* 74. § 1 *Lords' Report*, 263.

the writ called *Diem Clausit Extremum:* the Statute of Joint Tenants and the Ordinance of the Forests in the 34th year of the same reign, of which the former contained provisions principally relating to the administration of justice, and the latter sought to release the subject from the oppression of the officers of the forest. These documents speak only in the King's name and are in the form of charters; but they are regularly entered in that form upon the Great Statute Roll.* The Great Charter itself recites merely the advice of eleven leading ecclesiastics and sixteen nobles. In all the *vetera statuta*, including all our laws from Magna Charta to the end of the reign of Edward the Second, the King grants, or directs, or provides, or permits, sometimes by his council; sometimes by the assent of the archbishops, bishops, priors, earls, and barons; sometimes with the additional assent of the commonalty; sometimes no concurrence of any other party is expressed; sometimes, though but rarely, the enactment emanates from the King and his justices. "It seems," says Mr. Reeves,† "as if the business of making laws was principally left in the hands of the King, unless in instances where the Lords or Commons felt an interest in promoting a law or the King an advantage in procuring their concurrence; and in such cases probably it was that their assent was specially expressed."

§ 7. I shall frequently have occasion to show the attempts at legislative organization which in the course of his other reforms was made by the greatest of the Plantagenets. From that time probably the commencement of the second period may be dated. In the reign of his unhappy son, during some of the many

Legislation in petition.

* 1 *Lords' Report*, pp. 240, 247. † *Hist. of Eng. Law*, ii. 355.

troubles with which that reign was encompassed, an Act * was passed which among other things enacted that "the matters which are to be established for the estate of our Lord the King, and of his heirs, and for the estate of the realm and of the people, shall be treated accorded and established in parliaments by our Lord the King, and by the assent of the prelates earls and barons, and the commonalty of the realm, according as it hath been heretofore accustomed." This Act has been described as the first formal recognition of our present legislative system.† But whatever occasional instances may mark a period of transition, it is not until the reign of Edward the Third that the influence of the House of Commons becomes distinct, and that the second part of our legislative history is perfectly established. Almost all the numerous statutes of the reign of Edward the Third express in some form the assent both of the Lords and of the Commons. But they still were, not merely in name but in fact, the laws of the King. The Rolls of Parliament and the Statute Rolls distinctly express that the statutes were made at the request of the people by the King with the assent of the lords; but in the writs to the sheriffs by which these statutes were promulgated, no notice is taken of the means by which His Majesty was moved to act. In them, the statutes are described as made by "us and the Magnates and Proceres of our realm for the common benefit of the people of our realm."‡ The difference between this period and its predecessor is that in the second period the Royal legislative power was never exercised until it was put in motion from without. When any legal change was desired, the Commons petitioned the King to make such change; and the King with the advice of his great council (that is, the

* 15 Edw. II. † 1 *Lords' Report*, 282. ‡ *Ib.*, 302.

House of Lords) assented to this request either wholly or in part or refused it. But it seems to have been understood that the request of the Commons was a condition precedent to the exercise of the legislative power. When that power was once set in motion, its exercise was not necessarily limited by the terms of the petition. The King might not only refuse or grant the petition as a whole, but he might curtail or enlarge its prayer. The petition was in fact a request that the King would make a law on a certain subject; and this request sometimes specified, though for the most part indistinctly, the character but not the details of the desired change. Thereupon, if the petition were granted, the judges and their assistants were directed to prepare a statute. The petitions in fact amounted merely to instructions to the Royal draftsmen for the preparation of the bill. When these persons had finished their labours, their work was submitted to the King in council, approved by him, and duly promulgated.

Thus in the 14 Ed. II. (the year before that declaration of the Constitution to which I have referred), a statute was enacted authorizing the courts to grant a summary remedy by bill instead of the Common Law procedure by original writ. This statute was made by the King by the advice of the prelates earls barons *et aliorum peritorum* (that is, probably, the judges and other members of council summoned to attend) at the petition of the knights citizens and burgesses desiring a remedy for a grievance, but not specifying any manner in which that remedy was to be obtained. The representative bodies thus confined themselves to the expression of their wants, and left the duty of finding a remedy to the King and his council with the advice of the prelates earls and barons.* It is noteworthy,

* 1 *Lords' Report*, 279, 302; see also 5 Edw. III.

as showing how completely the power of legislation rested at that time with the King, that in some petitions several years elapsed before any legislation took place upon them. Most of the Acts now in our statute book under the date of the 25th year of the reign of Edward the Third were founded on petitions presented in his 21st year. One petition, indeed, of the last-mentioned year, which related to certain errors in the Court of Chancery, remained as it were in abeyance for ten years; and at the end of that time, without the presentation of any new petition, an Act in pursuance of its prayer was at length framed. It is also remarkable that the King frequently replied that he would take further advice, and that this reply never seems to have been regarded by the Commons as unsatisfactory. Many instances of these practices occur in the records of the time. His Majesty, for example, was besought to increase the fees of the judges. He answered that he would call to him the great persons and mention the matter to them, and upon their advice would ordain such remedies as might be proper.* In reply to another petition in the same Parliament, he said that he would advise with his council. To a petition complaining that courts of Probate were held at uncertain places, the King promised to speak with the Archbishop and other prelates that such wrong may be redressed.† In the 25th year of the same King there is a petition that the Statute of Provisors made in the last Parliament may be executed. To this petition the answer was given that "The King will have the same new read and amended where need be and do thereafter."‡ But the most remarkable instance of a law enacted by the King on the request of the Commons, but without their participation, is the Statute of Treasons. The Commons

* Reeves's *Hist. of Eng. Law*, iii. 143.

† 20 Edw. III., *Cotton's Abrid.*, 61. ‡ *Ib.*, 80.

complained of the uncertainty of the law, and requested the King to declare what was treason and what was not. In accordance with this request the King prepared and promulgated what in the language of the present day would be called an Act to Consolidate the Law of Treason. This celebrated statute* still remains after so many centuries the main standard of our law on this momentous subject; but whatever may be its merits or its defects, they are due to Edward the Third and his legal advisers, and not in any respect to the wisdom of Parliament.

§ 8. The inconvenience incidental to this system soon became felt. Sometimes the statute differed materially from the petition. Sometimes it did not even resemble the prayer of the petition, but was framed in a manner directly contrary to its spirit and to the intention of the Commons. Still more frequently the petition and the gracious reply which in due course the King had given to the prayer of his faithful Commons were quietly ignored, and no official record of them was made. Our earlier records contain frequent but apparently ineffectual complaints on this subject from the Commons. In the 22nd of Edward III., for example, the Commons pray that the petitions answered in the former year might not be altered or changed. In the eighth year of Henry the Fourth an act was passed which provided that certain of the Commons' House should be present at the engrossing of the parliament roll. In the following reign the Commons presented a still more energetic petition, remarkable not only for the boldness of its tone but for its use, hitherto unknown in our parliamentary records, of the English language instead of the Norman-French or the

Legislation by bill.

* 25 Edw. III. St. 5 c. 2.

Latin. To this petition Henry the Fifth returned a distinct and positive assurance that he would comply with their wishes. Yet, as Mr. Hallam* truly observes, the force of the tendency towards that fraudulent suppression of which this petition complains receives its strongest illustration in the fact that the petition was itself subjected to the very treatment for which it sought to provide a remedy. No trace of it is found among our statutes. At length the Commons adopted a new expedient. They submitted for the Royal assent "a petition containing in itself the form of a bill." This instrument, which contained the precise provisions that they desired, was the identical document on which the Royal Fiat was placed. No room was thus left for fraud or misunderstanding. But an unforeseen and remarkable consequence followed.† It became difficult, if not altogether impossible, for the Crown to amend the petition thus presented. When a request was made in so precise a form, nothing remained but either to assent to it or to reject it as a whole. Hence, although a few exceptions occur in the reign of Edward the Fourth, the practice was established, at all events before the accession of the Tudors, that the Royal assent should be given to or withheld from the precise advice tendered to the King by his Parliament.

§ 9. The change in parliamentary practice from procedure by petition to procedure by bill probably led to another equally unforeseen but equally important consequence. In former times, as I have said, the King always shared in the deliberations of Parliament. The writs to the Lords and to the Judges ran, *ad tractandum nobiscum et ceteris*. The

Deliberations of Parliament apart from the King.

* *Middle Ages*, iii. 90. † *Ib.*, iii. 92.

proceedings of Parliament seem even to have been irregular if they were not conducted in the King's presence. The *Modus tenendi parliamentum* repeatedly insists upon the necessity for the personal attendance of the King. It declares that "the King is bound by all means to be personally present in Parliament;" for "it is a hurtful and a dangerous thing for the whole community of Parliament and also of the realm when the King is absent from Parliament; nor ought he nor can he absent himself only unless in case of illness proved to the satisfaction of Parliament."* In the ninth year of Henry the Fourth a remarkable declaration, known† as the Indemnity of the Lords and Commons, was recorded, which seems to be the foundation of much of our present Constitutional Law. This declaration, which, it may be observed, was made by the King with the advice and consent of the Lords but without any mention of the Commons, although the necessity for it arose from their complaints, provided among other things that each House might deliberate in the absence of the King; and that in the case of money bills no report of any grant or of any communication for any grant should be made to the King until both Houses were agreed. Although this record does not forbid, except in the case of grants of money, the presence of the monarch or his personal consultation with his Parliament, the King soon ceased to take any share in their proceedings. Charles the Second revived the practice, then long disused, of attending, although merely as a spectator, the debates of the Lords, which His Majesty was graciously pleased to pronounce "as good as a play." On some occasions Queen Anne used in like manner to be present. But at this day the presence of the Queen at any debate in the House of Lords—for in

* P. 34, and see pp. 22 and 26.

† *Rot. Parl.*, iii. 611. See also Hallam, *Middle Ages*, iii. 103.

the House of Commons no monarch had any grounds for appearing—would be as irregular as five centuries ago it was indispensable.

Why the Royal Fiat is now never withheld.

§ 10. Although the practice of submitting to the King in a precise form the free and matured advice of his Parliament is thus established, it still rests with the Royal discretion to accept or to reject the advice so tendered. The last stage, then, of the exercise of the Royal legislative authority consists in those arrangements by virtue of which the Royal Fiat is never withheld from the proposals of Parliament. This unvarying reliance of the King on his existing councillors has been established since the Revolution. Queen Elizabeth* in the Parliament of 1597 assented to forty-three bills, public and private, and rejected forty-eight that had passed both Houses. James I., in 1606, on assenting to all the bills of the session, explained that he did so "as a special token of grace and favour, being a matter unusual to pass all Acts without any exception."† Although the Stuarts preferred to use the dispensing power, and lightly assented to bills that they never intended to observe, yet the close of their system brought back the use of the old prerogative. On four important public occasions, and once afterwards on a matter of less moment, William the Third declined to sanction bills which either infringed upon some part of the prerogative or seemed to him of doubtful expedience.‡ He refused to allow the Parliament without his consent to assign to the judges fixed and inalterable salaries out of his revenue. He would not derogate from his prerogative by reducing the duration of Parliament or by excluding from the House of Commons the servants of the Crown. On an innovation on

* 1 *Parl. Hist.*, 905. † *Parry's Parliaments*, 253.

‡ See Macaulay's *History of England*, iv. 183, 371, 479, 687.

which he had no personal interest but in respect to which public opinion was much divided, the introduction namely of a property qualification for members of the House of Commons, he gave his support to the liberal side. Once and once only after his death were the words "*La reine s'avisera*" pronounced in Parliament. In the first Parliament of Great Britain several measures consequent upon the union with Scotland were introduced. Among them was a bill "for settling the militia of that part of Great Britain called Scotland." This bill seems to have occasioned little discussion in the Lower House, and passed the Lords without amendment.* But when it was presented along with several other bills for the Royal assent, from it alone that assent was withheld. On that very morning (11th March, 1707) † news had arrived that the French Admiral Fourbin with James Edward on board had eluded the vigilance of Byng, and had sailed from Ostend towards Scotland. In the face of instant invasion the Government thought it unwise to arm a population whose loyalty was at the time by no means well assured. No complaint respecting this exercise of prerogative, although Parliament continued to sit for some months, seems to have been made at the time. On the contrary, when in the next session after the danger had passed away, the question of the Scotch militia was recommended to the consideration of Parliament in the speech from the throne, the bill which was accordingly brought in seems never to have reached its second reading.

On two occasions within the present century Acts of Parliament, although they had duly received the Royal assent, have failed to come into operation from the refusal of the Crown to perform some act which was necessary to

* 18 *Lords' Journals*, 481.

† *Ib.* 506; and see Somerville's *History of Queen Anne*, ii. 299.

give them effect. One was an Act passed in 1794* to enable the Government to carry into effect Mr. Bentham's celebrated project of the Panopticon. It appears that, whether (as Bentham asserted) from personal dislike to the author or from some reason now unknown, George the Third disapproved of the plan. Various inexplicable delays took place, until at length all the arrangements were approaching completion, and nothing more remained except the purchase of one portion of ground.† It appears that the King refused to sign the proper documents for the issue of the purchase money. Nothing further was done in the matter, but the Government was so much compromised that, seventeen years after the first Act, a second Act‡ was passed by which a different system was adopted and compensation for the breach of contract to the amount of £23,000 was paid to Bentham. In 1850 an Act§ was passed under the auspices of Lord Romilly to improve the system of registration of assurances in Ireland. The object which this measure contemplated was a somewhat elaborate system of registration of deeds, founded upon the maps prepared by the Ordnance Survey. It contained a condition suspending its operation until certain indices were prepared, and until notice of its commencement consequent thereon was given by the Commissioners of the Treasury. No such notice however has yet been published. Probably, considering the advance made in public opinion since 1850 upon the subject of the registration of land, it never will be published. Thus the Act, unless it has been lately repealed, remains in a kind of suspended animation, and the intentions of the legislature have (whether prudently or not I do not venture to express an opinion) been frustrated by the executive.

* 34 Geo. III. c. 4.
† Bentham's *Works*, xi. 102, 106.
‡ 52 Geo. III. c. 144.
§ 13 and 14 Vict. c. 72.

Although under the House of Hanover the power of refusal has never been directly exercised, it must not on that account be supposed that the power is obsolete or inoperative. So recently as 1858,* changes were made in a Railway Bill under an intimation that if the promoters of the bill did not accept the amendments, Her Majesty, when the bill was presented to her, would be advised to withhold her assent. Under our present system the intimation of the Royal will regarding any measure of importance is given at its introduction or at some early stage of its progress. The Crown has indeed generally possessed sufficient influence to prevent the passage of any measure that was peculiarly distasteful to it. Modern changes, too, in the civil list and in the management of the Royal revenue have removed many subjects of disagreement. But the true explanation is found in the good sense and the forbearance of both the King and the Parliament, and the practical arrangements to which a sincere desire of harmonious co-operation has given rise. In matters affecting the personal or proprietary interests of the Crown, Parliament will not deal with any proposal until the King has given an official intimation of his desire to receive on the subject its advice. By the rules of both Houses a message from the Crown through one of its ministers is now required before any question touching the prerogative or the revenue of the Crown is taken into consideration. Thus in 1843 when a bill relating to the Church of Scotland and interfering with the patronage of the Crown was brought into the House of Commons by a private member and came on for its second reading, the Speaker remarked that the bill ought not to have been introduced without the consent of the Crown; and ruled that the House could not permit the

* See Todd, *Parl. Govt.*, ii. 319.

measure to proceed further.* In the following year, when a bill relating to the diocese of Bangor was before the House of Lords, the Duke of Wellington intimated that Her Majesty's ministers had not been instructed to signify the consent of the Crown to that bill, and that it affected the Royal prerogative. It was doubted whether in these circumstances the question of the second reading could be put, and the bill was withdrawn.†

On the other hand, in matters of general legislation, the King, whatever may be his personal views, consults the wishes, however erroneous he may deem them, of his subjects, when those wishes have been deliberately formed and clearly expressed. The measures which might cause difficulty to the Royal mind are usually of such importance as to be Government bills. All such measures are introduced into Parliament by the servants of the Crown acting with the knowledge and the concurrence of the King. Thus when Lord Rockingham proposed to repeal the American Stamp Act, when Mr. Pitt brought in his Reform Bill, and when in the following reign the Duke of Wellington and Sir Robert Peel desired to introduce the Roman Catholic Relief Act, those ministers took care to obtain the previous consent of their Royal master to the introduction of their several measures. If a ministry adhere to a measure towards which the King cannot overcome his dislike, that ministry cannot remain in office. It was in such circumstances that the celebrated administration of the younger Pitt terminated; and it was the same cause that led to the overthrow of the Grenville ministry. If, notwithstanding all the efforts of the ministry, a bill to which the King was known to object were likely to be carried by Parliament, the course of the measure would probably be

* Bourke's *Parliamentary Precedents*, 120.

† May's *Parliamentary Practice*, 427 (6th ed.); and see 732.

interrupted by a dissolution, and the decision of the new Parliament would be accepted as final. In effect this course is sometimes taken, but under different forms. It is disguised under the character of a change of ministry. It is a sufficient inducement to the King to change his ministers, if his existing servants be unable or unwilling to conduct to his satisfaction his relations with Parliament. But if Parliament be resolute, and if after a dissolution the new ministry continue in a minority, further contest is useless; and the Royal will is graciously conformed to the manifest desires of the nation.

CHAPTER III.

THE LEGAL EXPRESSION OF THE ROYAL WILL IN JUDICATURE.

§ 1. The administration of justice has always been regarded as the first object, among modern nations, of civil society. To the King, as the great organ of the political system, this primary duty has in our Constitution been entrusted. "It is for this end," says Bracton, "that the King has been created and elected, that he may do justice to all." It is therefore from the Crown that all jurisdictions in the kingdom emanate. The Royal writ is the commencement of every suit. The Royal judges hear and determine all causes. The proceedings run in the Royal name, and the decisions of the courts are executed by ministerial officers of the Crown. Even in the earliest period of our history, long before our nationality was perfected, or the Royal authority was consolidated, this eminent function of Royalty was established. It was not, indeed, in the Saxon times necessary that every suit should be maintained in one of the Royal courts or be commenced under the authority of an original writ issuing out of the Royal chancery. On the contrary, the genius and the spirit of the Saxon laws * were unfavourable to the multiplication of business before the

The King is the fountain of justice.

* *L. A. Rex*, xxxv. 10.

supreme court of the King. But even among our Saxon ancestors the King was regarded as the authority by whom the judges were supported and upheld; to the King the injured subject who could find no justice elsewhere might carry his complaint; and to the King naturally belonged the power and the duty to punish all misconduct in the administration of justice by his officers.* Thus the Crown is and always has been the fountain of justice. But since the King does not now personally hear and determine the multitude of cases that come before his courts, it is necessary to inquire into the manner in which the pure waters of this sacred fount are made available for public use. The spring may be itself inaccessible, but there are channels and conduits to receive and conduct its supplies, and to distribute them to the remotest parts of the realm.

§ 2. There can be little doubt that the King once exercised in person his judicial will, as he exercises his other Royal functions. If in the time of Henry the Fourth special legislation were required to enable the two Houses of Parliament to transact business in the absence of the King, it may well be supposed that, in his High Court of Parliament when it was actually engaged in the transaction of judicial business, the King was actually, as he still is theoretically, present. The personal exercise by the monarch of his judicial authority seems universal in the earlier stages of political development. The practice has from time immemorial prevailed in the East. Augustus and his successors constantly performed the duties of the judicial offices with which they were invested. Among the northern nations before whom the authority of the Imperial Prætor and

Justice formerly administered by King in person.

* Kemble, *Saxons in England*, ii. 41.

Consul fell, the union of the functions of King and of judge was still more conspicuous.* The precedents given in the forms preserved by Marculfus evidently contemplate the personal action of the King. Early writers insist upon some amount of clerkly knowledge as essential for the due performance of the Royal duties ; and the kingly skill in undoing legal knots was no unacceptable theme for the laureates of the Merovingians.† As we approach the feudal times, we find that the practice which we thus attribute to the Kings of England prevailed in sister countries and in inferior jurisdictions. The great French monarchs seemed to have exercised judgment with an almost patriarchal simplicity. Eginhard relates how Charlemagne would hear causes while he was dressing or pulling on his boots. Joinville, writing of his Royal master St. Louis, tells us how on a summer's day, beneath the umbrageous oaks of Vincennes, the good saint, after hearing mass, would call around him his attendants, and then giving the freest access to all who sought his presence, would ask if any person had any suit ; and if any complaint were made, would direct two of his officers then and there to determine it according to the extent of their jurisdiction.‡ The feudal lords, too, presided personally in their respective courts. Especial mention is made of the activity of a Count of Flanders who visited every part of his dominions and dealt speedy and summary justice to all offenders. In Poland the King, until late in the sixteenth century, was the sole judge of important cases, as well criminal as civil, and went round his kingdom attended by a numerous retinue at stated periods to exercise this high office.§ Even so late as the

* See on this subject, Madox, *Hist. Exch.*, i. 88, *et seq.* ; Barrington's *Ancient Statutes*, 429.

† See Barrington, *ubi supra*. ‡ See Hallam, *Middle Ages*, i. 243.

§ Lord Brougham's *Political Philosophy*, ii. 82.

last century, in the year 1766, the King of Denmark* presided in the Supreme Court of his kingdom; and, although from his extreme youth his personal action can hardly have been more than nominal, is said to have actually decided a suit then pending. In Scotland, during the feudal period, the King passed no small part of his time in proceeding as supreme judge through the country from shire to shire. For these Royal progresses careful provision was made in the early Scottish laws. Even in the thirteenth century, "To judge his people," says a recent writer,† "was still the ordinary employment of a Scottish sovereign in time of peace; and he seems to have generally made an annual circuit through the sheriffdoms of Scotia and of southern Scotland." We read of the zeal and the impartiality which some of the Scottish Kings, such as David and Alexander II., showed in the administration of justice. Even towards the close of the thirteenth century, although the practice of the King sitting personally in Court was becoming infrequent, his right to take part in the proceedings seems undisputed, and was probably exercised on any important occasion.‡

Several passages in our earlier books may be cited in support of the direct exercise by English Kings of this prerogative. In the Dialogue of the Exchequer§ it is asserted that in the court of the Exchequer, as well as in the Curia Regis, the King *in propriâ personâ* makes decrees. Bracton declares that the King in person, if he be competent for the purpose, and no other, has jurisdiction. Britton says, "that although the King has divided the burthen of judicial duty into many parts, yet his jurisdiction is above all jurisdictions in the kingdom, so that in all

* Barrington's *Ancient Statutes*, 429.
† Robertson, *Scotland under her Early Kings*, ii. 130.
‡ *Ib.*, 133. § B. 1, c. 4.

manner of felonies trespasses and strifes and in all manner of actions real and personal he had power to give judgment and cause the same to be given without other process when he knew the right truth as judge." And at a later period, Lord Chief Justice Hobart, in speaking of the King, cites the significant maxim, "*si cessat judicare cessat regnare.*" These expressions, or some of them, refer, or at least may be construed to refer, to the extent of the prerogative, and not to its personal exercise. But apart from historical analogies and the dicta of text writers, there is distinct evidence of the personal attendance in judicial business of some of the earlier Kings. The first Plantagenet used frequently to transact business both in the Curia Regis and the Exchequer. The presence of Richard the First is specially noticed on the record at the sitting of the court, both at Westminster and in other places. John seems to have almost habitually presided in his court. It is noteworthy that, while the incessant change of the Royal residence, and, consequently, of the court which followed the Royal person, moving as it did on an average every month, and sometimes even twice in the month,* was felt to be an intolerable grievance and was specially dealt with in Magna Charta, no complaint is made in that great remedial instrument of the personal interference of the King in judicial business. Henry the Third,† and during his absence in France, the Queen, as Custos Regni, frequently sat in court, and especially in the Exchequer. We read of his hearing a case concerning a royal fish that was found on the land of an infant ward of the Bishop of Norwich; of his addressing the sheriffs on their duties, and fining some of them for their transgressions, and of his dealings on various occasions with amercements and other

* Foss's *Judges*, ii. 4. † Madox, *Hist. Exch.*, ii. 10.

matters affecting the Royal revenue. Even in the latter part of the fifteenth century Edward the Fourth* sat for three days in the Court of King's Bench to observe the administration of justice. The same King, at a time when on the disbanding of the troops which had been employed in France crime was, even for those troubled times, unusually rife, is said to have gone with the judges on circuit, not as a mere spectator, but as an active and impartial administrator of the law.

§ 3. Most, however, of the cases thus mentioned, if not all, were probably rather of an executive than of a judicial nature. The King seems to have generally attended the Exchequer; and in the earlier periods of our history the Exchequer was rather a department than a court. In the list of cases given by Madox, in which Henry the Third sat in the Exchequer, all the business, except perhaps a dispute between two Crown tenants as to which of them was entitled to the benefit of certain duties performed by an ancestor, has reference to the mere proprietary rights of the Crown. It is even recorded of this King† that on one occasion he left Winchester because Roger de Seyton and his companions were about to hold their circuit there. The language, too, of Gascoigne in the time of Henry the Fifth, and still more that of Fortescue in the following reign, show that the personal interference of the King must even then have been long obsolete.‡ If, therefore, the proposition be limited to cases between party and party, the assertion of Sir Edward Coke and the other judges that no judgment had been given by any King since the Conquest may not be incorrect. But now at

Justice now administered through judges.

* Barrington, *Anc. Stat.*, 419, 429. † Foss's *Judges*, ii. 135.
‡ See 2 *Inst.*, 186.

least it is an undisputed principle that the King, even though he be personally present in a court of justice, cannot interfere; but that the decision of every cause or motion must be pronounced by the mouth of the judges and not otherwise. The Royal will in matters judicial, like the same will in matters legislative, is not mere personal caprice, but the matured and enlightened judgment of the King acting under a full sense of his responsibilities and after he has called to his aid the practised wisdom of the sages of the law. Thus it was held, in the reign of Richard the Third, that, where an Act of Parliament provided that a delinquent should be fined at the will of the King, the fine must be imposed by the judgment of a court, for "*hæc est voluntas regis*" *viz.*—"*per justiciarios suos et legem suam, et non per dominum regem in camera sua vel aliter.*"*

The circumstances in which this principle was finally settled occurred in the reign of James the First. There had been a quarrel of long standing between the Ecclesiastical Courts and the Courts of Westminster Hall on the subject of jurisdiction. By a free use of the writ of Prohibition the judges had succeeded in restraining within reasonable bounds the ever-extending claims of the Church. In the time of Elizabeth and still more of James the First the churchmen thought that they saw the promise of happier times; but the operations of their Court of High Commission were relentlessly checked by the formidable Prohibition. Irritated by this constant impediment to his projects, the Archbishop of Canterbury (Bancroft) adopted the expedient of Evocation. He proposed to remove the cause from the tribunal of the King's Bench to the superior wisdom of the King in person. Such a

* 3 *Inst.*, 146.

course was in perfect harmony with King James's views respecting both his official powers and his personal qualifications. Coke, accordingly, and the other judges were summoned before the King to show cause why His Majesty should not withdraw such causes as he pleased from the determination of the judges and determine them himself. With the omission of some references the following is Coke's report of this memorable interview*:—

"The Archbishop said that it was clear in divinity that such authority belongs to the King by the word of God in Scripture. To which it was answered by me, in the presence and with the clear consent of all the judges of England and barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels or goods, etc., but this ought to be determined and adjudged in some court of justice according to the law and custom of England; and always judgments are given *ideo consideratum est per curiam*, so that the court gives the judgment; and the King hath his court, viz.—in the Upper House of Parliament, in the which he with his Lords is the supreme judge over all other judges; for if error be in the Common Pleas that may be reversed in the King's Bench, and if the Court of King's Bench err, that may be reversed in the Upper House of Parliament by the King with the assent of the lords spiritual and temporal, without the Commons; and in this respect the King is called the Chief Justice (20 H. vii. 7A) by Brudnell; and it appears in our books that the King may sit in the Star Chamber, but this was to consult with the justices upon certain questions proposed to them, and not *in judicio*. So in the King's Bench he may sit, but the court gives the

* 12 *Rep.* 64.

judgment; and it is commonly said in our books that the King is always present in court in the judgment of law, and upon this he cannot be non-suit; but the judgments are always given *per curiam* and the judges are sworn to execute justice according to law and the custom of England. And it appears by the Act of Parliament of 2 Ed. III. cap. 9, 2 Ed. III. cap. 1., that neither by the great seal nor by the little seal justice should be delayed: ergo, the King cannot take any cause out of any of his courts and give judgment upon it himself; but in his own cause he may stay it, as it doth appear 11 H. 4, 8. And the judges informed the King that no King after the Conquest assumed to himself to give any judgment in any court whatsoever which concerned the administration of justice within this realm, but these were solely determined in the courts of justice; and the King cannot arrest any man, as the book is in 1 H. 7, 4, for the party cannot have remedy given against the King; so if the King give any judgment what remedy can the party have? *Vide* 39 Ed. III. 14, one who had a judgment reversed before the Council of State; it was held utterly void for that it was not a place where judgment may be reversed. *Vide* 1 H. 7, 4, Hussey, Chief Justice, who was attorney to Edward the Fourth, reports that Sir John Markham, Chief Justice, said to King Edward the Fourth that the King cannot arrest a man for suspicion of treason or felony, as other of his lieges may; for that if it be a wrong to the party grieved he can have no remedy; and it was greatly marvelled that the Archbishop durst inform the King that such absolute power and authority as is aforesaid belonged to the King by the word of God. Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me that true it was that God had endowed His Majesty with

excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concerned the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it, and that the law was the golden met-wand and measure to try the causes of the subjects and which protected His Majesty in safety and peace: with which the King was greatly offended and said that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith '*Quod rex non debet esse sub homine sed sub Deo et lege.*'"

§ 4. In the judicial expression of the Royal will there is yet a further limitation. The rule that the will of the King is expressed by the mouth of his judges does not authorize the King to hear and determine cases by any persons appointed for that purpose and acting in any manner. The structure of the Crown's judicial organs is as precisely settled as the mode of exercising this function. All judicial proceedings must be before the Royal courts as they are known to the law. But "ancient courts ought to be exercised according to the ancient and right institutions."* These courts must therefore be constituted, and must proceed, in the manner which the law recognizes, and not otherwise. Accordingly the Crown cannot, of itself and without the sanction of a statute, create any new court, or change the jurisdiction or the procedure of any existing court, or alter the number of judges in any such court, or the mode of their appointment,

Judges must be known to the law.

* 4 *Inst.*, 125.

or the tenure of their office. The Chancellor, for example, is appointed by the delivery to him by the King of the great seal, and holds his office during pleasure. But if the custody of the great seal be granted by letters patent for life, as it was to Cardinal Wolsey, the grant will be void,* because "an ancient office must be granted as hath been accustomed." Thus the discretion of the Crown is limited either by the Common Law, in the case of courts of immemorial antiquity, or in the case of courts of recent origin by the Act of Parliament under which they are established. This principle, so far as regards criminal cases, is contained in the declaration of Magna Charta by which the King binds himself not to take proceedings against any person except by the judgment of his peers or the law of the land. It has been contended that these words require not only that the courts which try the King's cases should proceed according to the *lex terræ* but that they should be such as that law recognizes.† This construction finds some support in the Act which reversed the attainder of the Earl of Lancaster.‡ That nobleman was in the reign of Edward the Second brought before a sort of court martial appointed by the King for the purpose; was tried in a summary way; and was executed. His attainder was subsequently reversed; and the ground of this reversal was that, in a time of profound peace, when the usual courts were open and ready to administer justice, the Earl had been tried and convicted by an irregular tribunal. Various complaints founded on this principle were made by the Commons against the extension of the Chancellor's jurisdiction, before the place of the Court of Chancery amongst the prescriptive courts of the realm was fully acknowledged. The Petition of Right also condemns

* 4 *Inst.*, 87. † Sullivan's *Lectures*, 411.

‡ See 2 *Inst.*, 48.

in emphatic terms the conviction of offenders by martial law before special commissions "when and where if by the laws and statutes of the land they had deserved death by the same laws and statutes also they might and by no other ought to have been judged and executed."

The application of the same principles to civil cases is shown in a case decided in the reign of Queen Elizabeth. This case and some others, "which," says Sir Edward Coke,* "upon so great and mature deliberation have been resolved by the judges of the realm and whereunto we were privy and well acquainted with, we have thought good to report and publish for the better direction in like cases hereafter." "In a premunire between John Forest, plaintiff, and I. M. H. W. and others, defendants, it was resolved by Sir Christopher Wray, Chief Justice, and the Court of King's Bench, that the Queen could not raise a Court of Equity by her letters patent, and that there could be no Court of Equity but by Act of Parliament, or by prescription time out of the mind of man. But the Queen might grant powers *tenere placita* or *conusans de plea*, for all must judge according to one ordinary rule of the Common Law; but otherwise it is of proceedings extra-ordinary without any settled rule." Upon this principle, when a High Commission was issued by James the First for the trial of ecclesiastical offences, Coke and several other judges, though named in the commission, refused to sit under its authority. On the first meeting of the commissioners the Primate showed great anxiety to proceed with business, and produced, as a proof at once of the necessity for the court and as a subject for its speedy action, a notorious blasphemer. Coke, however, insisted that they should first understand the nature of the authority

* 4 *Inst.*, 87.

upon which they were invited to proceed; and at length the commission was, at his instance and with great reluctance on the part of the Primate,* solemnly read. It "contained three great skins of parchment and contained divers points against the laws and statutes of England; and when this was read, all the judges rejoiced that they did not sit by force of it."†

Securities for exercise of judicial office.

§ 5. For the due exercise of the great prerogative of which they are thus the guardians, the judges are surrounded with various securities. The first of these relates to their qualification. The judges must be members of the legal profession. The Common Law judges were until recently called to the degree of sergeant-at-law,‡ a condition which insured to the judge the *viginti annorum lucubrationes* that the dictum of Fortescue requires. For the judicial offices of statutory origin the Acts of Parliament under which they are respectively created usually specify some minimum amount of forensic standing. When the judge assumes his functions his decisions are limited either by the statutes which he administers or by the Common Law as enunciated and explained in the decisions of his predecessors. His judgments, after full argument upon both sides, are pronounced openly and in the face of the world; for, as Lord Coke observes,§ the judges are not judges of chambers but of courts. Thus both the inestimable advantage of publicity is secured, and the unseen but most potent influence of professional habits and of professional criticism controls every judicial word and act. If from

* Not Bancroft (as per Coke), but Abbot. See Gardiner, *Hist. Eng.*, ii. 38.

† 12 *Rep.* 88.

‡ Fortescue, *De Laud.*, 191, and see Foss's *Judges*, viii. 200.

§ 2 *Inst.*, 103.

any cause, whether wilful or involuntary, there be any failure of right, the party aggrieved has an appeal through a series of tribunals until the final judgment of the King in his High Court of Parliament, or as the case may be in his Privy Council, confirms or reverses the decision of his judges.

Although these arrangements are sufficient for securing a due administration of justice in matters of judicial right, there are cases in which something more is required. I do not now refer either to the intimidation from turbulent chiefs of which our early history and our laws afford examples, or to the contemptuous disregard for law which some governments even at the present day do not scruple to show. The former case is merely that of a weak executive ; the latter, of a dangerous one. But apart from any direct tendency towards either anarchy or despotism, it has been found that Royal favour or Royal smiles will sometimes cause the oracles of the law to return false and flattering responses. The lines which separate the judiciary from the executive become indistinct ; and the bench tends to degenerate into the mere registry of the palace. These interferences of the executive with the ordinary course of justice are of no infrequent occurrence in history. During the later Roman Republic public men used to send letters to the judges in any important case in which they were interested. This was one of the vicious practices which Pompeius vainly sought to reform in a law which he rendered memorable by his own speedy and conspicuous breach of its provisions.* In France, nearly at the same time as that in which the English statutes on the same subject were passed, an ordinance of Charles the Fifth directs the Parliament of

* Merivale, *Hist. of the Romans*, ii. 47, 49.

Paris to pay no regard to any letters under his seal suspending the course of legal procedure, but to consider them as surreptitiously obtained.* A similar law but of an earlier date is found among the statutes of Scotland.†

In English law various provisions have been made to guard against this evil. Of these there are four which require special notice. The first is the prohibition of the interference of the Crown under any of its seals with the due course of justice. The second is the oath of the judges as settled by statute. The third is the permanence given to the tenure and the salaries of the judges by the Act of Settlement. The fourth is the amendment of these provisions of the Act of Settlement at the commencement of the reign of George III. An Act of the second year of Edward III.‡ directs that it shall not be commanded by the great seal nor the little seal to disturb or delay common right: and though such commandment do come, the justices shall not therefor leave to do right on any point. On this statute a writ§ was framed directed to the judges and commanding them on no account to regard such irregular mandates. In the following reign, in consequence of the misconduct of Richard II., another statute‖ was passed, which provided that neither letters of the King's signet nor of the privy seal should thenceforth be sent in disturbance of the law. In the reign of Edward III. several other attempts¶ were made to secure the better administration of justice. Among them was the regulation of the judicial oath.** It was provided that the judges shall swear that they will not receive any fee or present except meat or drink of very small value; that they will not take robes from anyone

* Hallam, *M. A.*, iii. 151 *n.* † Barrington's *Anc. Stat.*, 263.
‡ 2 Edw. III., c. 8. § 4 *Inst.*, 68. ‖ 11 R. II., c. 10.
¶ See Barrington's *Anc. Stat.*, 261, 263. ** 18 Edw. III., c. 4.

except the King, or give counsel when the King is party, and further that they will not regard any letter or message from the King with relation to any point depending before them. But even when its direct interference was prohibited, the influence of the executive was sensibly felt. Where coercion could not be applied, persuasion might prevail. The King could not indeed control his judges' decisions; but he might, like James the Second, take care to have all his judges of his own mind. The troublesome judge might be superseded. The compliant judge might be rewarded. Promotion or an increased salary often induces men to see a question in a different aspect from that in which they would otherwise regard it. Although the barons of the Exchequer frequently held office during good behaviour, and although examples of a similar tenure among the justices of either bench were not rare, the judges were generally appointed during pleasure. Under the fiscal system which then existed, their salaries were paid directly by the King out of the Royal revenue, and were of course dependent upon his discretion. In these circumstances the conflict between duty and interest was sometimes such as men should not be required to endure. Several attempts were made to correct this mischief. In 1640 the Lords passed a resolution, to which the King assented, that the judges should hold office during good behaviour. After the Restoration, while Lord Clarendon was in power, the patents were made out in this form; but after his fall the appointments were made during pleasure. In 1680 the House of Commons resolved that a bill should be brought in to secure the tenure of the judges. At the time of the Revolution it was one of the reforms recommended by the Committee of the Convention Parliament over which Lord Somers presided; but in the pressure of other more urgent matters it was postponed to a more

convenient season. In 1693 a bill passed both Houses which proposed to give to each judge a salary of £1,000, payable out of the Civil List. But King William thought that Parliament, if it wished to be liberal, should not be so at his expense, and refused his assent. At length, however, a clause was inserted in the Act of Settlement directing that the salaries of the judges should be fixed and ascertained, and determining their tenure. But it was held that the death of the reigning King vacated all his commissions. This opinion, although its accuracy has been disputed,* was followed in practice until after the accession of George the Third. One of the first public measures of that King, and for which, useful though it was, he has received more than his fair share of praise, was to recommend to Parliament the removal of this limitation. His suggestion was adopted,† and at the same time an improvement of much greater practical value was effected. Although the Act of Settlement had directed that the salaries of the judges should be fixed and ascertained, it contained no precise enactment for the purpose. This defect was remedied by the Act of George the Third. The amount of salary attached to each office was specified, and the sum was made a permanent charge on the Civil List. Thus the independence of the Bench was secured as far as law can secure it; and the strong public opinion which the law has rendered habitual is perhaps the best possible safeguard for the efficiency of this portion of our institutions.

Tenure of judicial office.

§ 6. The provisions of the Act of Settlement and of the Act of George the Third, which determine the tenure by which the judges hold their office, have never been the subject of judicial interpretation. Few

* Lord Campbell's *Chancellors*, v. 149. † 1 Geo. III. c. 23.

of our historians or juridical writers have noticed the peculiarity of this tenure. They content themselves with remarking that the judges have been rendered independent, and cite the terms of the Acts without observing that any question has been raised concerning the precise meaning of these terms. There is not, indeed, any real difficulty in the case. But popular opinion seems to hold that the judges are amenable for their conduct to Parliament only. Some loose expressions in English writers appear to countenance this opinion; and it has recently been expressly maintained by an American writer of repute.* The question, therefore, is not undeserving of careful consideration.

By the Act of Settlement the judges' commissions are issued *quam diu se bene gesserint.* The legal effect† of such a grant is the creation of an estate for life in the office, conditional upon the good behaviour therein of the grantee. Such an estate, like any other conditional estate, may be forfeited by a breach of the condition annexed to it—that is to say, in this case, by misbehaviour. Behaviour means behaviour in the grantee's official capacity.‡ Misbehaviour includes both the abuse of office—that is to say the improper performance of official duties—and in the case of judicial and public offices wilful neglect or non-attendance.§ Misbehaviour also includes a conviction for any infamous offence by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct the decision of the question whether there be misbehaviour rests with the grantor, subject, of course, to any subsequent proceedings on the part of the amoved

* See Curtis's *History of the Constitution of the United States*, ii. 69.
† *Co. Litt.*, 42*a*. ‡ 4 *Inst.*, 117.
§ 9 *Reports*, 50. ‖ *Rex v. Richardson*, 1 Burrow, 539.

officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury according to law.* Where the office is granted for life by letters patent, the forfeiture must be enforced by *scire facias*† or other appropriate proceedings. These principles apply to all offices, whether judicial or ministerial, held during good behaviour. But the tenure of the judicial office has two peculiarities. It is not determined, as all other offices granted by the Crown are determined, by the death of the reigning sovereign. It is determinable upon an address to the Crown by both Houses of Parliament. The presentation of such an address is an event upon which the estate in his office of the judge in respect of whom the address is presented may be defeated. The Crown is not bound to act upon that address; but if it think fit so to do, it is thereby empowered, notwithstanding that the judge has a freehold estate in his office from which he can otherwise be amoved only for misconduct, to amove the judge without any further enquiry or without any further cause assigned than the request of the two Houses.

It is, however, contended that the proviso in the Act of Settlement does not contain a power to limit the tenure, but describes the process by which the breach of the condition is to be ascertained. In this view the misbehaviour is established not by the ordinary legal proceedings, but by the vote of both Houses of Parliament. This construction is supported on the grounds that it is necessary to render the proviso consistent with the body of the section, since a power of discretionary removal is repugnant to the tenure of good behaviour, and that such a power is inconsistent with the avowed policy of the law—the inde-

* *Rex v. Richardson*, 1 Burrow, 539.

† *Com. Dig. Office* 2, K. ii., *Prerog. D.*, 69.

pendence, namely, of the judicial office. To these arguments it may be replied that the supposed repugnancy does not exist. The estate in the office, whether the proviso be present or absent, is still a conditional estate for life. The only difference which the proviso makes is that a new condition by which that estate may be defeated is introduced. But a condition which renders an estate otherwise clearly defined dependent upon the consent of a third party is not repugnant to the grant. "If a lease be made on condition that if a stranger dislike it or be discontented with it the lease shall be void, this is a good condition."* But this case is much stronger, for it is the reservation by the grantor of a power of revocation in certain contingencies. The proposed construction is also open to the objection that it attributes to the two Houses of Parliament judicial functions. The question whether certain facts amount to legal misconduct is a question of law, and must be judicially decided. If the proviso relate merely to the process of ascertaining misconduct, the action of the Crown upon the address of the two Houses can only be lawful when misconduct exists. But such a proceeding is not a legislative act; and the mere resolutions of either House or of both Houses are not binding upon or even noticeable by the courts; nor does the Act contain any words to render the decision of the Houses final, or to oust the courts from their jurisdiction. Consequently the question of misconduct would still remain for judicial determination. Thus the two Houses of Parliament might pronounce a judge guilty of misconduct, and might by address obtain his removal; while a court might hold that the alleged act did not amount to misbehaviour in contemplation of law, and that the amotion was unjust.

* Shephard's *Touchstone*, 129.

It is further contended that the power of amotion is inconsistent with that independence of the judges which it is the main object of the clause to secure. If it were so, the inconsistency would have been a reason why the proviso should have been omitted. The object of the clause was undoubtedly to prevent that undue interference by the Crown with the judges in the exercise of their judicial functions which was one of the most prominent grievances in the time of the Stuarts. This object, however, was not effected by taking away from the judges the ordinary protection of the courts. If no other object were sought in the English enactments save the complete independence of the judges, as was the case in the formation of the Constitution of the United States, the proviso would have been omitted in the one case as it has been in the other. The judges would have held their office simply during good behaviour; and no necessity would have arisen for the anomalous interference of Parliament. The intention, however, of this proviso admits of a distinct explanation. If it were necessary to guard the judges from the terrors of the Crown, it was equally necessary to secure them from its seductions. The reigns of the Stuart Kings abounded in precedents of the amotion of upright judges; but they were not less significant as to the maintenance of the dishonest or to the influencing of the weak. The distrust of the judiciary which was thus generated seems to have long remained in the English mind. Even at the close of the last century writers of repute used language in relation to the Bench which would now be rightly and unanimously reprobated. But in any circumstances and on general principles the tendencies of the Bench are such as to call for unceasing vigilance from the representatives of the people. The hope of promotion, the zeal of former political connections, the flatteries of a court, the prejudices

of their time of life towards authority, and the prejudices, at least in some instances, of their profession towards prerogative, tend to incline the judges towards the support of the government, and the maintenance in their unaltered condition of existing institutions. In addition to these considerations it was obvious that cases might arise in which the continuance in office of a judge, even though his conduct in the actual exercise of his office could not be impugned, might yet be highly inexpedient. It was then in the interest of the people both that the discretion of the Crown was restrained, and that the modification of the tenure which the proviso contains was added. The grievance which experience had indicated was the amotion of judges for political reasons at the mere will of the executive. The remedy that was applied was designed to correct this grievance, but not to go further. It was not intended to abolish, but only to regulate, the power of amoving unfit judges who were not ill conducted. Much less was it the intention of Parliament to abandon any portion of that salutary control over every department of the state which the Constitution confers upon it, and which after centuries of struggles had at length, at the very time in which this tenure of the judges was settled, been definitely established. While, therefore, Parliament retained the power of punishing by impeachment a corrupt judge, it reserved the power of procuring by address the amotion of an improper judge. Without this reservation the control of the judges would have passed altogether from Parliament. Yet the practical importance of that control, even though it has never been actually exercised in the United Kingdom, is strongly felt. "I would," says Mr. Hallam,* "by no means be misinterpreted as if the general

* *Const. Hist.*, iii. 193.

conduct of our courts of justice since the Revolution and especially in later times, which in most respects have been the best times, were not deserving of that credit which it has usually gained, but possibly it may have been more guided and kept straight than some are willing to acknowledge by the spirit of observation and censure which modifies and controls our whole government."

Some confirmation of this view may be obtained from the Constitution of the United States. In that country the Supreme Court is required to decide finally between the rights and powers of the Federal government and the rights and powers of the separate States. It was foreseen that this duty would involve the decision of questions in which whole classes of States might have the deepest interest, and in which the representatives of the States in the national legislature were likely to feel as warmly as their constituents.* In these circumstances the independence of the judges upon the legislature was not less important than their independence upon the executive. Accordingly the power of amotion upon address was deliberately omitted, and the judges hold during good behaviour without any other condition. Thus when it was desired that the judges should be independent both of legislative and of executive control, that object was accomplished by giving them a freehold estate in their office according to the ordinary rules of law. When the object was to render the judge independent on the Crown but not on the legislature, the object was attained by reserving in the grant of the estate for life a power of revocation upon a parliamentary address. In neither case was it necessary to convert the legislature into a tribunal for determining freehold rights. When legislative interference was inexpedient, the power

* Curtis's *Hist. of Const. of United States*, ii. 74.

of the legislature to interfere was taken away. When such interference was considered to be desirable, the power was given without any limitation upon the discretion of Parliament in tendering its advice, and without any obligation upon the Crown to accept it.

§ 7. "The King* willeth and commandeth that the peace of Holy Church and of the land be well kept and maintained in all points, and that common right be done to all as well poor as rich without regard to persons." This great canon of law was, as Lord Coke observes,† an ancient maxim of the Common Law, and was affirmed in the laws of our Saxon ancestors. Its renewed assertion was one of the earliest actions, and its enforcement was the constant care of the great Plantagenet King whose statute I have cited. Under the system that he established, and with the various improvements that it received under his successors, the administration of British law is such as may well call forth an honest pride. Our noble *isonomia*, the absence of any privileged class (for our peerage with its few and inoffensive privileges, limited to the holders of the title for the time being, scarcely forms an exception), and the equal rights which are the birthright of every subject of our Queen, have been the theme of just and frequent eulogy. But not less deserving of admiration is both that steady resolution with which this ideal equality is practically maintained, and the readiness with which the highest of the realm in his contention with the lowest submits to the undisputed supremacy of the law. It was no idle boast of Lord Chatham that although the wind might whistle around the poor man's straw-built hut, although the rain

Supremacy of the Law.

* 3 Edw. I., *Statute of Westminster the First.* † 2 *Inst.*, 159.

might enter it, the King could not. Lord Coke* has preserved a remarkable indenture which shows that Henry the Eighth, before he could erect a chase and forest round his palace at Hampton Court, was obliged to obtain the consent of the freeholders and copyholders affected by his project; and yet, as Lord Coke significantly observes, "King Henry the Eighth did stand upon his prerogative as much as any King of England ever did." The very occasion on which Lord Chatham spoke the words that have now been cited is a memorable instance of the submission of might to right. It was on the question of general warrants, when a journeyman printer sued and obtained heavy damages from a Secretary of State for an act which had at least the sanction of long official custom. Only a few years before this event two striking cases occurred in which men of humble position successfully vindicated their rights against Princes of the blood.† The Princess Amelia was convicted of a nuisance in stopping up a footpath in Richmond Park. The Prince of Wales, the father of George the Third, was compelled to close a door which he had opened from his residence, Leicester House, through the premises of a poulterer. Nor are the most exalted personages reluctant to claim the protection of the law. De Lolme,‡ who dwells with a sort of despairing admiration upon this part of our political system, mentions his astonishment at seeing, shortly after he came to England, a board on an enclosed place in Windsor Park threatening trespassers in the familiar terms with all the terrors of the law. In our own time we have witnessed a still more striking case of the same class. Some years ago a daring piracy was committed of certain drawings made for their private use by Her Majesty and the late Prince

* 4 *Inst.*, 301. † Earl Russell's *Eng. Govt.*, 314 (1st Ed.)
‡ 2 Stephen's *De Lolme*, 926, 970, *n.*

Consort. The provocation was great ; the offender was a man of no mark : the injured persons were the highest in the realm. But no summary method of redress was attempted ; and the husband of the Queen applied for and obtained an injunction * in the same manner as any subject might have done. Nor is it the least remarkable circumstance in these cases that they excite no further remark than any other action of the same personages might do. The decisions of the judges upon them are not regarded as models of heroic virtue, nor is the submission of the illustrious defendants or the forbearance of the still more illustrious plaintiff considered a proof of Royal condescension and rare magnanimity. All such cases are taken as matters of course, and as the usual and natural state of things. The habit of justice is completely formed in the nation ; and those actions which excite in our foreign visitors enthusiastic admiration appear to us too simple to attract greater attention than that which we give to the usual gossip of the Court or to any ordinary topic of the day.

* *Prince Albert v. Strange*, 1 M'Naghten and Gordon, 25.

CHAPTER IV.

THE LEGAL EXPRESSION OF THE ROYAL WILL IN ADMINISTRATION.

§ 1. The conduct of the executive government, no less than the administration of justice or the business of legislation, exhibits the peculiar character of our Constitution. We may trace in it at the same time the monarchical spirit of our institutions, and the arrangements by which the power of the King is controlled. A direct authority for the principle both that all political action proceeds from the King, and that such action must assume a prescribed and definite form, is found in a case determined in the reign of Queen Elizabeth and known as Sir Walter Mildmay's case.* The circumstances were these. An information was preferred by the Attorney-General against the executors of Sir Walter Mildmay as an accountant to the Queen. As to part of the sum claimed the jury found for the defendant; but as to the larger part they returned a special verdict. They found that Sir Walter Mildmay was Chancellor of the Exchequer; that the Lord Treasurer and the Sub-Treasurer had issued a warrant for the payment to Sir Walter Mildmay from the Queen's treasure of one hundred pounds yearly for his diet, and forty pounds yearly for his attend-

Sir Walter Mildmay's case.

* 11 *Rep.* 91*a*.

ance in London during the vacation time, during the Queen's pleasure; that this additional payment was made in consideration of certain additional business and attendance with which Sir Walter Mildmay was charged; that the Queen had issued a warrant under her privy seal to the Treasurer Chamberlains and Under-Treasurer authorizing in effect the payment of money at their discretion for any services rendered to Her Majesty or costs incurred on her account; that after the issue of this warrant the sums in question had been paid to Sir Walter Mildmay under the authority of the warrant of the Treasurer and Under-Treasurer; "and if upon the whole matter the court shall adjudge that the said Sir Walter Mildmay received the said money to render account to the Queen, then they found for the Queen; and if not, for the defendants."

On this case it was resolved: First, "that no officer that the King has nor all of them together can *ex officio* issue or dispose of the King's treasure, although it be for the honour or profit of the King himself; for it is true that it is for the honour and profit of the King that good service done to the King should be rewarded; but it ought to be rewarded by the King himself, or by his warrant and by no other; for the King's treasury (being the bond of peace, the preserver of the honour and safety of the realm, and the sinews of war) is of so high estimation in law in respect of the necessity of it that the embezzling of treasure-trove, although it was not in the King's coffers, was treason; and treasure and other valuable chattels are so necessary and incident to the Crown that in the King's case they shall go with the Crown to the successor, and not to the executors, as in the case of common persons; and therefore without the King's warrant no treasure shall be issued for any cause whatsoever by any officer *ex officio*."

Second, it was resolved that "every warrant of the Queen herself to issue her treasure is not sufficient; for the Queen's warrant by word of mouth, or what is more the Queen's warrant in writing under her privy signet, is not sufficient to issue her treasure, and that appears by a judgment in the Exchequer in Petelian's case,* where such warrant under the privy signet to issue the King's treasure was disallowed. And yet in some cases the law takes notice of the privy signet, and therefore if the King under his privy signet doth prohibit any to pass out of the realm, it is sufficient. But the warrant which is sufficient in law to issue the King's treasure ought to be under the great seal or privy seal." It was also resolved that, on the construction of the instrument, the warrant under the privy seal did not include the case of the Chancellor of the Exchequer, but applied to inferior officers only; and that although Sir Walter had received the King's treasure to his own use, yet forasmuch as he received it without a lawful warrant, he knowing that it was the King's treasure, the law makes a privity in the King's case, and therefore he may charge him as an accountant.

§ 2. This case then shows that every important act of State must be done by the King. Such acts must indeed follow a prescribed form, but still they are the King's acts. So essential is this sanction of the King that he cannot delegate his authority to issue any public command. He cannot, as notwithstanding some precedents to the contrary it seems to be now settled, dispense by any means or in any exigency with the use of the sign manual, or provide any substitute for it. If he be physically unable to write, provision may be made

Commands of State must proceed from Crown.

* *Mich.* 1 Edw. IV., *Rot.* 14.

for his infirmity by an Act of Parliament, but not otherwise. When during the illness of George the Fourth Parliament* sanctioned the use of a stamp instead of the sign manual, the most ample precautions were taken that the stamp should not be affixed to any instrument except in the presence, and in each case by the express command, of the King. In the preceding reign the necessity for the King's personal action was even still more forcibly shown. In 1811, when George III. was struck with his last hopeless illness, certain sums had been duly appropriated by Parliament for the military and naval services. But the King was incapable of signing any instrument, and the Regency Bill had not yet been passed. The usual warrants, therefore, under the privy seal, directing the issue of such moneys from the Exchequer, could not be made. The Keeper of the privy seal was prepared to incur the responsibility of issuing the seal without the Royal commands. But it was necessary that the clerks of the privy seal should prepare the letters which were to pass under the privy seal; and these officers thought that they were precluded by their oaths of office from preparing, in the absence of any command signified under the sign manual, any such letters. In this emergency the Lords of the Treasury addressed warrants to the Auditor of the Exchequer, directing him to draw on the Bank of England two orders for the amount of half a million of money each. Lord Grenville, who was then Auditor, desired to have the advice of the Attorney and Solicitor General. The opinion of these officers was that the warrants were not a sufficient authority for the Auditor. The Lords of the Treasury offered to assume the entire responsibility of the proceedings. Lord Grenville, however, pointed out that his responsibility could not be

* 11 Geo. IV. and 1 Wm. IV. c. 23.

thus transferred, and resolutely refused to draw the orders. Ultimately the money was obtained by means of a resolution of both Houses of Parliament; but, notwithstanding the pressing necessity of the occasion, a protest against such an assumption of the executive powers of the Crown was recorded in the House of Lords by six Royal Dukes and fifteen other Peers.*

§ 3. "The King," says Lord Coke,† "being a body politique, cannot command but by matter of record." Another great authority‡ assures us that the excellency of the Sovereign is so high in the law that no freehold may be given to or derived from the Crown but by matter of record. Whichever of these reasons be correct, the actual fact is undisputed. We have seen that all commands relating to the administration of justice are expressed under the seal of some court. For the transaction of non-judicial business the law recognizes three seals of the King. These are the great seal, the privy seal, and the signet. All Royal grants and patents must be made under these seals, or some of them. Each seal is entrusted to its appropriate guardian, whose duty is to examine every instrument to which it is proposed that the seal in his custody should be affixed, and to inform the King of any objection to its use that he may observe. The clerks, too, whose duty is to prepare in their several offices the instrument intended to be sealed, are, as the precedent of 1811 shows, bound to see that they do not prepare and deal with an illegal instrument. The number of persons, indeed, who are directly responsible for the issue of any grant of the Crown is considerable; and the grant itself involves a highly elaborate process. Grants are now

Agencies for expressing Royal commands.

* See May's *Const. Hist.*, i. 179, 180. † 2 *Inst.*, 186.
‡ *Doctor and Student*, book i. chap. 6.

usually prepared by the law officers of the Crown. They then receive the sign manual, and are countersigned by a Secretary of State or the Lords of the Treasury, according to the nature of the instrument. A warrant to pass the instrument under the great seal is next prepared under the sign manual, countersigned by a Secretary of State and sealed with the signet. This warrant is then sent to the Keeper of the privy seal, by whom it is signed and sealed. From the Keeper of the privy seal it is sent to the Lord Chancellor, who is thereby authorized to issue letters patent under the great seal, according to the tenor of the warrant. Thus the signet authorizes the use of the privy seal; and the privy seal authorizes the use of the great seal. "Such was the wisdom of prudent antiquity, that whatsoever should passe the great seale should come through so many hands to the end that nothing should passe the great seale, that is so highly esteemed and accounted of in law, that was against law or inconvenient; or that anything should passe from the King any wayes which he intended not, by any undue or surreptitious warrants."* There are some cases in which the great seal is affixed to instruments by the authority of the sign manual alone, countersigned by a Secretary of State. Sometimes too, especially in affairs relating to the army and the navy, the Royal will is expressed through other agencies. These variations, however, are merely matters of administrative form, and do not affect the principle under consideration. There is no case other than those I am about to mention where the King acts without the intervention of some officer, whose assistance is essential to the validity of the act and is rendered at his own peril.

* 2 *Inst.*, 556. But see 47 & 48 Vict., c. 30, "An Act to simplify the passing of instruments under the great seal of the United Kingdom."

§ 4. There are, however, certain cases, and these too of no common magnitude, which form exceptions to the foregoing rule. In these cases the King does not necessarily require either the assistance or the advice of any officer. He acts in person, and does not merely command actions. The first of these cases is the prorogation or the dissolution of Parliament. Parliament is convened by writs under the great seal, issued, as they always set forth, by the advice of the Privy Council; but it may be terminated by the mere oral announcement of the King himself. This mode of dismission is usually adopted for prorogation, unless it be personally inconvenient to Her Majesty to attend. A dissolution is now seldom announced in this way, but the power so to dissolve Parliament does not admit of doubt. In like manner the Royal assent may be given to, or withheld from, any bill without the interference, and without the responsibility, of any officer. The Clerk of the Parliament, indeed, announces in a set form to the Parliament the Royal pleasure with respect to every bill that is presented for assent; but even if that officer were to refuse to notify in any case the Royal disapprobation, the bill in respect to which he ventured upon such a course would still fail to become law. Unless in the case of a ministerial bill, there does not seem any ground for the interference with the exercise of this prerogative even of the ministry. If, for example, George the Third had at once refused his assent to Bentham's Panopticon Bill, instead of withholding his sanction from the steps necessary to bring it into operation, Mr. Pitt would not have been bound to resign, or would not even have been justified in tendering his resignation. The matter rests with the King and his Parliament. He cannot legislate without its advice, but he is not compelled to legislate at all. He can himself

Where Royal commands are direct.

intimate his disinclination to accept their advice; and the law does not require him, in forming his resolution on the subject, to consult with any other person.

Another example of the same kind may be found in the appointment of some of the higher officers of state. The Lord Chancellor and the Secretaries of State, and some other officers known to the Common Law, are appointed by the mere delivery to them by the King of the seals or other symbols of their respective offices. Privy councillors become such immediately upon taking, by direction of the King, the proper oaths. The dismission, too, of his servants may be effected by the King in a manner equally summary. It is difficult to see what direct control can in any of these cases be exercised upon the Royal will. How modern usage and the practice of what is known as Parliamentary Government have effectually prevented the occurrence of any such difficulty, we shall presently consider. But, apart from all questions as to the prudence of such a course, I am not aware of any legal provision by which any criminal responsibility could be fixed upon any person for any unlawful appointment to any of these offices, or by which any responsibility, whether criminal or parliamentary, could attach for any indiscretion in the use of the prerogative either towards Parliament or in the dismission of ministers.

Under our present system of constructing a Cabinet, no difficulty of this kind in relation to the appointment of officers can practically occur. But, with the view of including every act of state within the rule which requires for the validity of any such act the advice or the assistance of some subject, it has been maintained that the retiring minister is responsible for the selection of the next person whom the King consults. A similar explanation has been sought for the practically more important cases of a change

of ministers or of a dissolution. It is said* that the minister who succeeds to office when his predecessor has retired in consequence of any dissolution, is responsible for any exercise of the prerogative, whether in dissolving Parliament or otherwise, that has led to such retirement. This principle was strongly urged on the dismission of Lord Grenville's ministry in 1807, and in 1835 was adopted in his own case by Sir Robert Peel. It is not, however, easy to understand the precise nature of this responsibility. No man can be criminally responsible for an act which he neither did nor advised, and to which he was not in any way privy. It can hardly be contended that any person would be liable to impeachment or any other proceeding on the sole ground that, at his Sovereign's command, he had accepted office under the Crown, even although, prior to his acceptance of such office, the prerogative had been wrongly or even criminally exercised. If the law were to cast upon any minister an indefinite responsibility for all the acts of the Crown before his accession to office, from which responsibility he could not by any act of his own be relieved, no ministry could be formed after the occurrence of any doubtful exercise of the prerogative. But if criminal liability be thus impossible, the supposed responsibility of an incoming minister can only mean that, in case of a difference between the Crown and Parliament respecting some exercise of the prerogative, the acceptance of office by a minister in circumstances unfavourable to the opinion of the Parliament furnishes to Parliament a reasonable ground of objection to his appointment. If, however, there be a majority hostile to the minister, it is not necessary for Parliament to assign any reason or to seek any excuse for advising the King to change his servants; and if there be

* May's *Const. Hist.*, i. 92, 95, 125.

not such a hostile majority, the disapprobation by either House of the dissolution or other exercise of the prerogative does not, even according to modern practice, involve the necessity of resignation.

§ 5. Although the person of the King is at all times inviolate, the law shows in matters of right no delicacy or respect towards his servants. Every officer is criminally responsible for his conduct in the execution of his office. If, contrary to his duty, he do or forbear from doing any act, he is guilty of a misprision or contempt. If under colour of his office he attempt to commit any unlawful act, he is answerable for the consequences. If he proceed to perform his office under an insufficient or irregular command, his conduct is held to be unauthorized; and the apparent command so given to him furnishes him with no justification. These principles apply without distinction to every kind of officer. They relate alike to a bailiff or a private soldier, and to the governor of a colony or a Secretary of State. The law admits of no excuse for the commission of any wrongful act. No person is bound or even permitted to obey any unlawful command; and every person when he incurs any serious responsibility is presumed to satisfy himself as to the authority under which he acts. If therefore a soldier, even in obedience to his commander, fire upon any unoffending crowd with fatal effect, he is guilty of murder. If an officer attempt to make an arrest under a general warrant and be killed in the attempt, the homicide is justifiable. If a Lord Chancellor issue, as Lord Somers issued, under the great seal blank powers for negotiating a treaty, or if a Prime Minister negotiate, like Lord Danby, the payment of money by a foreign monarch in

Personal liability of officers.

consideration of a certain exercise of the prerogative, or if an Ambassador withhold, as Lord Bristol was accused of withholding, information from his Royal master, he may be impeached for high crimes and misdemeanours. It is, as I have said, no justification for a wrongful act that it was committed by the direction of another, even though that other may be a person whose lawful commands the wrongdoer is bound to obey. In ordinary cases of torts the servant continues personally liable, although he merely executed his master's directions. The private soldier may be reduced to the hard necessity of choosing whether he will fire upon innocent men or disobey the commands of his officer; whether he will elect to be hanged for murder or to be shot for mutiny. In like manner the commands of the highest personage in the realm afford no excuse for the breach of the royal laws. *Rex præcipit* and *lex præcipit*, as Lord Coke tells us, are all one; and the mere personal and unauthenticated expression of the Royal will is never held sufficient to dispense with its deliberate and official command. Though the King, says Lord Hale, is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law; which consequently makes the act itself invalid if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.

Unlawful command not an excuse.

§ 6. This principle, which is one of the highest importance in Constitutional law, has long been thoroughly established. Like most of the other leading principles of our law of political conditions, it did not introduce into our legal system any startling novelty; but it is merely the steady and consistent application of a wider and more elementary principle

of general law. "It is so natural," says Dr. Lieber,* "to the Anglican tribe that few think of it as essentially important to freedom; and it is of such vital importance that none who have studied the acts of government elsewhere can help recognizing it as an essential element of civil liberty." It is then not unbecoming to consider some of the more remarkable instances in which this doctrine, so important in itself and so characteristic of our race, has been applied. It has indeed done good service in days when Constitutional principles were yet unsettled. Familiar as it now is to us, this doctrine formerly sounded very harshly in Royal ears; and the resolute adherence of our ancestors to it deserves some grateful remembrance.

The leading authority on the subject seems to be the famous declaration of Sir John Markham to Edward the Fourth, that the King cannot in person arrest or imprison any man; and that if one man arrest another without lawful warrant, though he make such arrest by the King's command and in the King's presence, he shall not be excused, but shall be liable to an action for false imprisonment.† A remarkable discussion in which this principle was recognized took place in the reign of Elizabeth. It is usually known as Cavendish's case. The Queen granted to Mr. Richard Cavendish an office for issuing certain writs. But the right‡ of issuing these writs and of retaining the fees incident thereto was vested in the prothonotaries and others who claimed it by freehold. The judges of the Court of Common Pleas accordingly did not admit the grantee. After several directions had been to no purpose sent to them, the Queen sent a peremptory command, under the sign manual and the signet, and required an immediate answer. The judges still persisted

* *Civil Liberty*, 91. † 2 *Inst.*, 186. ‡ Anderson's *Reports*, 152.

in their refusal; and the Chancellor, the Chief Justice, and the Master of the Rolls were appointed to hear the judges' reasons. The Queen's sergeant appeared for the Crown. In reply to his statement the judges confessed that they had not obeyed the letters of the Queen; but said that this was no offence or contempt towards Her Majesty because the command was against the law of the land, in which case they said no one is bound to obey such command; that the Queen herself was sworn to keep the laws as well as they; and that they could not obey this command without going against the laws directly, and plainly against their oaths and to the offence of God, Her Majesty, the country and commonwealth in which they were born and live; so that if the fear of God were gone from them, yet the example of others and the punishment of those who had formerly transgressed the laws would remind them and keep them from such an offence. Then they cited the Spencers, and Thorpe, a judge under Edward the Third, and precedents of Richard the Second's time, and of Empson, and Magna Charta and several statutes of Edward the Third and of Richard the Second, which show what a crime it is for judges to infringe the laws of the land; and thus since the Queen and the judges were sworn to observe them, they said they would not act as was commanded in these letters. "All this," says the reporter (Sir J. Anderson), "was repeated to Her Majesty, for her good allowance of the said reasons, and which Her Majesty as I have heard took well." And so no further proceedings were taken in behalf of Mr. Cavendish.*

Another authority to the same effect is the case of the

* In the following reign a more successful attempt was made upon the same office. The case (*Bruendese v. Mitchell*), on which Bacon delivered his famous argument on the writ "*De Rege inconsulto*," was ultimately compromised. See *Bacon's Works*, vii. 683.

impeachment in the reign of Charles the First of the then Attorney-General Herbert.* This officer had exhibited articles of impeachment to the House of Lords against the members whom the King, with such disastrous consequences to himself, thereupon attempted personally to arrest in their places in Parliament. For his conduct in this matter the Attorney-General was himself impeached by the House of Commons. In his answer he alleged that the King had personally delivered to him the articles of impeachment ready engrossed on parchment, and commanded him to proceed instantly to the House of Lords there to exhibit the articles and to take the necessary steps for committing to prison the accused persons ; that he had neither furnished nor advised these articles, nor knew anything of their truth ; but that he did not conceive there could be any offence in what was done by him in obedience to His Majesty's commands. In confirmation of this statement the King sent a letter to the Lord Keeper to be read in the House, in which he expressly declared that the Attorney-General was in no way concerned with the articles that he had been ordered to exhibit ; and that if he had refused obedience to the Royal commands "we would have questioned him for the breach of his oath's duty and trust." The Lords, however, regarded this letter "as a prelimiting of their judgments," and without paying any attention to it proceeded with the trial. The defendant was found guilty and was sentenced accordingly.

So, too, on a rule† requiring the College of Physicians in London to show cause why a mandamus should not issue for the examination of a certain candidate, there was inserted in the affidavits in answer to the rule a letter written by King Charles the Second to the College in

* 4 *State Trials*, 119.

† The King *v.* the President and College of Physicians, 7 T.R., 282.

1674, in which he signified his pleasure, and directed the College "not to admit any person who had not had his education in either of our Universities of Oxford or Cambridge." But it was admitted in the argument that no notice could legally be taken of this letter, and it was disregarded accordingly.

Several similar cases have occurred in subsequent reigns, although from various causes none of them actually became the subjects of judicial decision. In 1679 the Earl of Danby* was impeached for (among other things) having conducted a negotiation with the King of France for securing the neutrality of England in a war between France and Holland in consideration of the sum of six million livres. Lord Danby replied that the letter in which this offer was contained was written by the King's command upon the subject of peace and war, "wherein His Majesty alone is sole judge and ought to be obeyed not only by any of his ministers of state, but by all his subjects." This statement was confirmed by the letter itself, which had been laid before the House of Commons in support of the charge, and was endorsed by the King with the words, "This letter was writ by my order." In like manner the great Whig champion, Lord Somers,† pleaded the King's command as a sufficient defence to articles of impeachment, for using the great seal in an improper manner and for affixing it to an objectionable treaty. A few years afterwards the chief of the Tories, Harley, Earl of Oxford, when impeached for concluding the peace of Utrecht, had recourse to the same mode of defence.‡ Each party indeed in the state freely used against the assaults of its opponents the shield of the Royal authority. The application of the true principle was probably obscured by the

* 11 *State Trials*, 627; *Const. Hist.*, ii. 409.
† 14 *State Trials*, 267. ‡ 15 *State Trials*, 1089.

active share which the King then took in the business of administration, and the absence of those rules which are now familiar as to the exercise of the discretionary power of the Crown. But although Mr. Hallam* seems to consider "the delicate question of ministerial responsibility in matters where the Sovereign has interposed by his own command" as unsettled in the reign of Anne, there seems little doubt that both then and now and at all times, the voice of the law utters on this subject no uncertain sound, although in evil times that voice may have been silenced or disregarded.

§ 7. A similar responsibility attaches to those persons whose duty it is to counsel the King as that which attaches to those who execute his commands. If any person advise the King to do any illegal act, he is guilty of a misprision, no less than if he had assisted in the commission of the act itself. The evil counsellor needs not be concerned in the execution of his project. The advice and the execution are two distinct offences, although both may be committed by the same person. Nor does the legal effect of such counsel depend upon the official position of the counsellor. The offence is the same whether it be committed by a person who is or by a person who is not connected with the business on which he is consulted. On some occasions when the business is urgent and a meeting of the Cabinet cannot conveniently be procured, the practice is that some of the leading ministers meet, and, after consultation, communicate their opinions to Her Majesty. Every one of the ministers who were present at such a meeting is equally responsible with the minister to whose department the

Personal liability of advisers.

* *Const. Hist.*, iii. 232.

business belongs for the advice that they thus jointly tender.* There may perhaps be a practical difficulty in obtaining legal evidence of any criminal advice. In the Act of Settlement an attempt was made to obviate this difficulty by the provision that all matters of state should be debated in the Privy Council; and that their resolutions should be signed by the councillors present. This clause, however, along with several others of the same Act, was repealed before it came into operation, and Mr. Hallam seems to think that legal proof has thus been rendered unattainable. In the case of any great officer of state the use of the seal, of which he had the custody, or his signature or countersignature to any instrument in question, would be evidence as well on a charge of maladministration, as (though not conclusively) on a charge of tendering evil advice. In Herbert's case, although the impeachment contained articles for advising and contriving, as well as for exhibiting the offensive instrument, and although it was strongly urged that the acknowledged exhibition raised a legal presumption of the prisoner's contrivance and advice, the Lords would not admit the argument, and found him guilty of the exhibition only. But although in the case of offenders unconnected with the particular business the possession of sufficient evidence may be difficult, it is not impossible. In the impeachment of Lord Danby, and afterwards of Lord Oxford, for (amongst other charges) giving certain advice, although both these proceedings from other causes were unsuccessful, the Commons appear to have obtained from documents and the official acts of the prisoner ample evidence. It is probable that the principal members of the ministry would be presumed to be cognizant of the acts of the government, and that each

* Per Lord J. Russell, 3 *Hansard*, cxxx. 387.

cabinet minister would be presumed to have either advised the Crown or acquiesced in the advice given by his colleagues at least in all matters within his particular department and would not be permitted to evade official knowledge of such matters. Such presumptions must necessarily arise from the invariable practice in the administration of the affairs of state which it would not be difficult to prove.*

§ 8. This principle of the personal responsibility of any officer for his acts or his advice depends for its successful operation upon another principle not less characteristic of our country, and of which the sad experience of less fortunate nations attests the importance. The officer is not only responsible for his acts, but he is responsible to the ordinary tribunals. However disagreeable or inconvenient an inquiry may be to the Government of the day, the whole force of the Administration cannot either prevent an action from being commenced in the usual manner against any public officer, or control in the slightest degree its course after its commencement. I have already mentioned the peremptory denial with which the judges met the claims of the Crown to withdraw from the ordinary tribunals any case that seemed to merit Royal attention.† The exercise of the so-called martial law unsupported by any statutable authority was one of the grievances with which the Petition of Rights dealt, and in after years was the point on which the judges of James the Second proved most refractory. The case was far otherwise in France. The strange

Officers responsible to ordinary courts.

* Bowyer's *Constitutional Law*, 129; and see Cox's *Institutions*, 244.

† For an attempt to evoke causes before the Chancellor by means of the writ *de Rege inconsulto*, and Bacon's object in advising this proceeding, see Mr. Gardiner's *Hist. of Eng.*, ii. 266.

expressions *la justice administrative et la garantie des fonctionnaires*, for which our language can with difficulty find an imperfect translation,* have been familiar in France as well under the old as under the new régime. The council of state and the inferior extraordinary jurisdictions that were from time to time created constantly encroached upon the jurisdiction of the original courts. The rule was at length established † that all suits in which a public interest was involved, or which arose out of the construction to be put on any act of the administration, were not within the competency of the ordinary judges, whose only business it was to decide between private interests. This rule was merely the formal acknowledgment of the power, which the council had long exercised, of Evocation, or the calling up to its own superior jurisdiction from the ordinary courts suits in which the administration had an interest. In the exercise of this power the council continually called up to its jurisdiction suits which were connected in only the most remote manner with matters of administrative interest, and not unfrequently suits which had not even the pretence of such a connection. No public officer of the old monarchy was allowed to be the subject of proceedings in any ordinary court. It was held that the principles of such courts could never be reconciled with those of the government; that the public business would be disturbed by constant litigation against the officers of the various departments; and that the King's authority would be compromised by any such proceedings. This feeling is so strongly impressed on the French mind that the Revolutionists gave legal form to the usurped jurisdiction of the Royal council, and that Imperialists and Legitimists alike have concurred in supporting this doctrine of the Revolution.

* De Tocqueville's *L'ancien régime et la Révolution*, 95, note. † *Ib.*, 98.

"Amongst the nine or ten Constitutions," says M. De Tocqueville,* "which have been established in perpetuity in France within the last sixty years, there is one in which it was expressly provided that no agent of the administration can be prosecuted before the ordinary courts of law without having previously obtained the assent of the government to such a prosecution. This clause appeared to be so well devised that when the Constitution to which it belonged was destroyed this provision was saved from the wreck; and it has ever since been carefully preserved from the injuries of revolutions. The administrative body still calls the privilege secured to them by this article one of the great conquests of 1789, but in this they are mistaken; for under the old monarchy the government was not less solicitous than it is in our own times to spare its officers the unpleasantness of rendering an account in a court of law like any other private citizens. The only essential difference between the two periods is this. Before the Revolution, the government could only shelter its agents by having recourse to illegal and arbitrary measures; since the Revolution, it can legally allow them to violate the laws."

§ 9. There is a form of trial for state offences which at first seems inconsistent with the principle that all offenders are amenable to the ordinary courts. This is the proceeding by impeachment. But impeachment, although recourse is seldom now had to it, is a proceeding well known to the law. It is not a means of defending the administrative officers, but it was designed more effectually to attack them. It is not, as some persons appear to think, a novel form of jurisdiction over acts that

Impeachment.

* *France before the Revolution*, 102.

would otherwise be innocent ; nor does it affect the exercise of the discretionary powers of the Crown, except so far as the abuse of these powers may amount to a breach of positive law. Impeachment is the right which the House of Commons possesses concurrently with the Crown to institute criminal proceedings against any offender. These proceedings must be brought by the Commons before the House of Lords, and not before any other court ; and the Lords, on such a prosecution only, may try commoners for misdemeanours, felonies, and even—although this power has been disputed—for treason. Although any crime may be the subject of impeachment, this mode of procedure is seldom used except in political offences. Examples of its use in all its forms occur at the period of its revival, after long disuse, towards the end of the reign of James I. Sir Giles Mompesson was impeached* for an ordinary misdemeanour. Lord Bacon was impeached for misconduct in his judicial capacity. The Earl of Middlesex was impeached in circumstances in which, since the time of Walpole, a vote of censure would have been regarded as appropriate. Even in political cases the inefficiency of impeachment is well established, and may easily be explained. The body that prosecutes and the body that decides were established for quite other purposes. It is an example of confusion of functions. Of two deliberative bodies one assumes administrative, the other judicial, duties. The House of Lords is indeed a judicial tribunal ; but the Lords sitting collectively in their criminal jurisdiction are very different from that great court of ultimate appeal in civil cases, which the eminent lawyers known as the "Law Lords" exclusively form. Experience has fully confirmed all that might have been predicted respecting

* Hallam's *Const. Hist.*, i. 357.

the discharge by the two Houses of Parliament of such uncongenial duties. Thus, when Warren Hastings was impeached, the proceedings dragged their slow length along for nine weary years and through two successive Parliaments. When Lord Melville was impeached, every good Tory voted a hearty acquittal, while all the Whigs joined in an indignant condemnation. Since that trial, in the commencement of the present century, no instance of an impeachment has occurred. This form of procedure is indeed a thing of the past. The circumstances in which it was useful have long since disappeared. Its original design was to prevent any miscarriage in justice from the reluctance of the Crown to prosecute or to obtain a conviction. It sought to remedy those shortcomings on the part of the prosecutor which the Roman law, under its peculiar mode of private prosecution, punished under the names of "Prevarication" and "Tergiversation." There would have been little chance that Charles the First would have prosecuted Buckingham, or that Charles the Second would have prosecuted Danby. Even if such prosecutions were instituted, the Crown which granted a pardon while an impeachment was pending would not have failed to use the more effectual remedy of a *nolle prosequi;* or would, at the most, have taken care not to obtain a verdict. Since, therefore, an inefficient prosecutor was better than a dishonest one, the Commons themselves undertook the task of bringing political offenders to justice. They naturally proceeded before that great court in connection with which they themselves were for other purposes sitting—the highest court known to the law and the one in which the Royal influence was least to be dreaded. It was in opposition to the court, by a section of the court party, that impeachments began; it was in opposition to the court by a similar section that

they were revived.* The period of their most frequent use was the stormy reign of Charles and his two sons; and the period at which they gradually fell into disuse was that in which confidence in the administration of justice was established. Simultaneously, too, with this improved state of our criminal courts, a higher standard of political morality and the better appreciation of the principles and practice of Parliamentary Government have removed at once all cause for such proceedings and all temptation to seek for such causes.

A remarkable proof of the obsolete character of impeachment is found in its deliberate omission from all the written Constitutions that during the last century have been constructed on the Anglican model. No Colonial Constitution contains any provision respecting impeachment. It was thought, and, so far as our present experience extends, rightly thought, that the existing criminal law and the practice of Parliamentary Government were sufficient security. In America impeachment exists, but it agrees only in name with the English impeachment. The framers of the American Constitution thought it unnecessary to provide any especial procedure for punishing the crimes of public officers.† They left such persons, like all other persons, to the jurisdiction of the ordinary courts of justice. But they were obliged to provide some means for removing from office during the term for which they were elected the President and other officers of the Union. This object they proposed to effect by a proceeding originated by the Lower House before the Senate. The inquiry of fitness for office involves political rather than judicial considerations. This authority was therefore rightly vested in the

* See Hallam's *Middle Ages*, iii. 57; *Const. Hist.*, i. 372; Sanford's *Studies of the Great Rebellion*, 121.

† Curtis, *Hist. of the Const. of the United States*, ii. 260.

Senate, and not, as was originally proposed, in the Supreme Court. But even if the cause of removal should be the actual commission of a crime, the Senate merely displaces the offender, and leaves the law to redress the wrongs of the law.

CHAPTER V.

THE DISCRETIONARY POWERS OF THE CROWN.

§ 1. We have hitherto considered the Constitution under its purely legal aspect. We have seen both its monarchical character, and the extent and the nature of the limitations to which the power of the King is subject. But the precautions which are thus taken that the King shall not violate the laws, although they form a very important part, are far from being the whole, of our Constitutional system. Their result is merely a negative advantage. In every form of government the secret of success must always depend upon the exercise of those powers which are entrusted to the prudence and the honour of its rulers. In the difficult and perplexed art of politics, as in other arts of infinitely less complexity, the best intentions and the most rigid abstinence from every positive fault are insufficient for success. Either from negligence or ignorance or skilful fraud a country may be brought to the verge of ruin; and yet it may be impossible to point out any act of any individual upon which a criminal prosecution can be justly grounded. It is therefore, as Burke* has observed, next in order and equal in importance to the legal limitation of the Royal functions that the discretionary

Regulation of Royal discretion.

* *Works*, iii. 132.

powers which are necessarily vested in the Monarch, whether for the execution of the laws or for the nomination to magistracy and office or for conducting the affairs of peace and war or for ordering the revenue, should all be exercised upon public principles and national grounds. "That form of Government," says the same great philosopher, "which neither in its direct institutions nor in their immediate tendency has contrived to throw its affairs into the most trustworthy hands, but has left its whole executory system to be disposed of agreeably to the uncontrolled pleasure of any one man however excellent or virtuous, is a plan of polity defective not only in that member but consequently erroneous in every part of it."

No such deficiency can be imputed to the Constitution of England. It is, indeed, in this respect that its practical excellence consists. In other countries the legal powers of the Crown are not less limited ; and in other countries the range of the executive is more curtailed and is more jealously guarded. But nowhere else has the harmony between the legislature and the executive been so completely established. Even in England this result is but of yesterday. It has been attained only after centuries of misunderstandings, of quarrelings, and of bloodshed. One King lost his life, another his throne, a third was more than once on the point of abdication, before even an approximate solution of the difficulty was obtained. Even after three generations, when Constitutional principles were comparatively established, at the very time at which Burke was expounding its doctrines, the unyielding adherence of George the Third to his own resolutions convulsed England to the centre, dismembered the empire, and neglected the auspicious moment which might have saved half the troubles of Ireland. "*Tantæ molis erat Romanam condere gentem.*"

§ 2. The foundation on which the doctrines of our modern Constitutional system rest is very simple. It consists in the extension to the discretionary powers of the Crown of that rule of its official expression which controls the exercise of its legal powers. It supposes that in the former as well as in the latter case the King will act officially through, and by the advice of, some acknowledged servant or counsellor. This principle has a double application. The first relates to the proceedings of the Royal advisers; the second to their choice. In every act of state the King is guided by the advice of his counsellors; and in their removal he is guided by the advice of his Parliament. Thus, while no confusion arises between their respective functions, the harmony between the executive and the legislature is complete, and remains so. The vigour and the uniform action of the executive are maintained; but the direction of its force is altered according to the wishes of the legislature. It is in the means of effecting quickly perfectly and safely this change that the great utility of our present practice consists.

Foundation of Constitutional system.

I have said that this practice is of very recent date. Its principles, however, were solemnly affirmed in Parliament upwards of five hundred years ago. In the year 1316,* after considerable dissension, an arrangement between King Edward II. and his discontented nobles was effected. The King requested the Earl of Lancaster, one of the most prominent leaders of the opposition, to become President of his Council. The Earl, after some hesitation, accepted the office, but upon terms which were duly recorded in Parliament. The conditions for which the Earl stipulated were three. The first was that if the King refused to

* 1 *Parl. Hist.*, 64.

follow the advice tendered to him, the Earl "without evil will, challenge, or discontent," should be discharged from the Council. The second was that the business of the realm should not be performed without the assent of the Council. The third was that if any improper advice be given to the King, the offending counsellor shall at the next Parliament by the advice of the King and his friends be removed from his office.

The arrangement itself is thoroughly in accordance with the general principles of our Constitutional law. The law recognizes the necessity of surrounding the King with competent advisers, and accordingly assigns him various councils for various purposes. He has his Parliament as a council of legislation. He has his Learned Council for questions of law. He has his Privy Council for matters of state. It is therefore the intention and spirit of the law that, even where it does not absolutely require the King to proceed upon advice, he should exercise his Royal powers on full deliberation with suitable counsellors. But the High Court of Parliament is the greatest and highest council of advice and deliberation that attends the Crown. It is in this court that the King has, in the words of Lord Hale,* "a plenitude of power as well legislative as deliberative and executive, or power of jurisdiction in its full comprehension." It is in this court that the function of legislation is conducted ; it is to this court that the power of ultimate jurisdiction belongs ; and it is the duty of this court to represent to the King whatever it may see amiss in the conduct of the servants of the Crown. It brings to justice by a peculiar process those delinquents with whom from their position or the nature of their offences the ordinary tribunals cannot

* *Jurisdiction of the House of Lords*, 9.

deal with the same facility as with other criminals. But this body is not only "an accuser of competence to criminate, but a council of wisdom and weight to advise."* When, therefore, it represents to the King that the counsellors in attendance on the Royal person either have deserved from some particular cause to lose the Royal confidence or are from their general conduct or character or other circumstances unworthy either at that time or at any time to be honoured with that confidence, the King graciously follows the advice of his Parliament and seeks for some less obnoxious ministers. "Thus," says Burke,† "all the good effects of popular election were supposed to be secured to us without the mischief attending on perpetual intrigue and a distinct canvass for every particular office throughout the body of the people. This is the most noble and refined part of our Constitution. The people by their representatives and grandees are entrusted with a deliberative power in making laws; the King with the control of his negative. The King is entrusted with the deliberative choice and the election to office; the people have the negative in a Parliamentary refusal to support."

§ 3. The presence of both these conditions, the exercise of the prerogative by the advice of ministers and the enjoyment by those ministers of the confidence of Parliament, is essential to Constitutional Government. The connection between these conditions is so intimate that it is difficult to treat them separately. Little argument is needed to show that the King would be more disposed than otherwise he might be to listen to his ministers' advice, if he knew that

Twofold condition of Constitutional Government.

* Burke's *Works*, iii. 525. † *Ib.*, 134.

that advice was in unison with the general sentiment of Parliament. It is not less certain that Parliament would soon cease to remonstrate, if its representations produced a change indeed of men, but no change of measures. The proper conduct of Parliamentary Government implies that the King shall not retain any servants whom Parliament advises him to dismiss; and that he shall, while he retains them, give to his recognized servants his full confidence, and be exclusively guided by their advice. Both these propositions have been by some of our Kings peremptorily denied. Occasionally one of them has been, as it were, tacitly conceded. It was not until the present reign that both can be said to have been fully established. When Parliament requested Richard the Second to remove certain courtiers, he told them that he would not change his meanest scullion to please them. But apart from the insolence of an infatuated youth, the control of Parliament over the Royal advisers was very slight. Neither the great Tudor Queen nor her father would have permitted any interference with their service. When Lord Salisbury died, James the First protested that he would have no secretary imposed upon him by Parliament.* The emphatic and reiterated greetings of George the Third to "his" Chancellor and "his" Chancellor of the Exchequer express the same feeling. Even so late as 1803 Mr. Pitt seems to have thought that direct opposition to a ministry on the grounds of mere incapacity was a dangerous interference with the prerogative. He accordingly refused to join in any attempt to displace the Addington Administration. He seems to have thought that his public duty could best be performed by giving the ministry a formal support, and by criticising their proposals and endeavouring

* Gardiner's *History of England*, ii. 60.

to guide their conduct. The experience of a few months convinced him of the futility of this scheme of indirect supervision. According to modern practice the question would have been quickly and satisfactorily solved by a vote of want of confidence. But the first successful use of such a vote dates from 1841 * and not from any earlier period.

Even if a minister were thus appointed, it did not follow that he could carry out the measures which he and his supporters desired. Office is proverbially a softener of the eagerness of opposition, and in former days this influence was peculiarly felt. If a minister desired to retain his place, he must be at least on tolerable terms with his Royal master. If he wished to carry out any public object, he must consent to such terms from the Crown as he could obtain. For in such circumstances official position was indispensable; and official position, if once it were lost, could not easily be regained. Thus all the ministers of George the Second, Walpole and Granville, the two Pelhams, even the elder Pitt himself, found themselves obliged in turn to adopt, notwithstanding their personal objection, the same policy of Continental interference and Hanoverian aggrandizement. Under none of our Kings was the personal authority of the Monarch so low as under the first two Georges; and yet, as Mr. Hallam observes,† "it is certain that the strong bent of the King's partiality forced them (*i.e.*, his measures of foreign policy) on against the repugnance of most statesmen as well as of the great majority in Parliament and out of it." It is not until the reign of George the Third that we hear of a demand for an entire change of policy as a condition precedent to the acceptance of office; and it

* See Earl Russell, *Life of Fox*, iii. 310. Todd's *Parl. Govt.*, ii. 395.
† *Const. Hist.*, iii. 294.

seldom happened that the ministry that made such demands was long lived. Mr. Pitt himself was gradually drawn away from his original principles into a general adhesion to prerogative. Even when his views were decided on questions of great political importance, he was unable to do all that he wished. On the great question of Catholic Emancipation the King was obdurate, and Mr. Pitt on returning to office was obliged to waive the subject. But on matters of less moment Mr. Pitt's advice was not always accepted. He was unable to place Paley on the Episcopal Bench. He desired the Primacy for his former tutor, the Bishop of Lincoln ; but although it is said that language was used on this occasion far stronger than usually passes between a Sovereign and his minister,* the great ecclesiastical prize was given to another. As long indeed as George the Third was capable of business, every act of state and every appointment was submitted to him for his judgment and approval.† At so late a date as the Regency, vehement complaints were made in Parliament of the "pestilent secret influence" at Court,‡ and it was openly avowed that the Regent was surrounded with favourites, and as it were besieged with minions, not one of whom had any character. The prospects of Catholic Emancipation in the time of George IV. were considered favourable, when it was reported that the *Regnante* for the time being was well disposed towards the measure.§ Even in the last reign the voice of the old complaint was not altogether silent ; and it was said that William the Fourth listened to the suggestions of his Queen and her personal friends more than to the advice of his responsible ministers.

* Earl Stanhope's *Life of Pitt*, iv. 252.
† May's *Const. Hist.*, i. 75.
‡ Duke of Buckingham's *Memoirs of the Regency*, i. 339.
§ Duke of Buckingham's *Memoirs of George IV.*, i. 148.

§ 4. It has been a subject of no small surprise and remark that our modern system of government is not expressed, and seems incapable of being expressed, in a legal form. The Cabinet is a body unknown to the law. When it was desired that Responsible Government, as it is called, should be introduced into the colonies, it was found* that the nearest approach to a written description of it was obtained by a very trifling change in the Governor's instructions. The reason of this strange fact is now apparent. Our present political system deals with the discretionary powers of the Crown. But where powers are discretionary, their exercise cannot by the very terms be controlled. Where there is legal obligation, there is no room for discretion. But unless the Monarchical form of Government were changed, a course which neither now nor at any previous time the country could be induced to adopt, a large discretion must rest with the Crown. Thus since this condition must be accepted as an ultimate fact in our political system, and since all direct control is from the very nature of the case impossible, nothing remains but to provide such indirect influences as may best tend to secure the satisfactory use of that discretion.

Why Responsible Government is unknown to positive law.

It is perhaps to this portion of our institutions that the terms constitutional or unconstitutional are properly applied. Nothing, indeed, can be more vague than the popular use of these epithets. It has been said, not untruly, that they really imply nothing beyond approval or dislike of the object which they qualify. Some eminent writers, however, have attempted to describe their meaning with greater precision. Mr. Hallam, in reference to the maintenance of a standing army by the Stuart Kings,

* See Merivale, *Colonization and Colonies*, 636.

expresses his doubts whether this exercise of prerogative amounted to a violation of any positive law; it was, however, he adds, "unconstitutional, by which as distinguished from illegality I mean a novelty of much importance tending to endanger the established laws."* Mr. Austin† considers as unconstitutional a law or other act of a Monarch or Sovereign number which conflicts with a maxim which the Sovereign habitually observes, and which the bulk of the society or the bulk of its influential members regard with feelings of approbation. In a more restricted sense the same term may be used, according to the same distinguished jurist,‡ "to import that the conduct in question conflicts with constitutional law"—that is, with "the positive morality or compound of positive morality and positive law which fixes the constitution or structure of the given supreme government." Mr. Austin cites bills of attainder as an example of the former meaning. An instance which seems to illustrate the latter meaning is the Act of Parliament which gave to the proclamations of Henry VIII. the force of law. Sir G. C. Lewis says that "when certain practices or usages though not legally binding on any part of the community have been constantly observed both by the governors and governed, they are properly styled constitutional, and any measure or practice contrary to them is styled unconstitutional."§ But Mr. Hallam's explanation would include every Reform Bill, and indeed every considerable amendment of the law; and although bills of attainder may be unjust or impolitic and are happily unusual, it is but a waste of words to describe them with Mr. Austin as unconstitutional. The term has greater force when applied to such an Act as that of

* *Const. Hist.*, ii. 105.
† *Jurisprudence*, i. 229. ‡ *Ib.*, 230.
§ *On the Use and Abuse of Political Terms*, 6.

Henry the Eighth, but here too the proper epithet would seem to be impolitic or inexpedient. The unconstitutional is included in and is a branch of the inexpedient. Everything unconstitutional is certainly inexpedient, but not everything that is inexpedient, even in reference to public law, is unconstitutional. The word in short must be taken in a different sense from inexpedient in matters relating to the law of political conditions. If it were not so, the term must either include trifling matters to which no one would ever think of applying it, or its characteristic force must depend upon mere difference of degree.

To me the definition given by Sir G. C. Lewis, if not quite exact, seems preferable to the others which I have cited. I venture to think that the true connotation of the term refers to the exercise of discretionary powers, whether vested in the Crown or in any other body, or to any matters affecting such exercise. It implies some power which, though there is no legal compulsion, yet is usually exercised according to the good customs of the country in a particular way, and so as not to disturb the working of the other parts of the political system. According to this view the maintenance of a standing army might be said to have been unconstitutional. It was the exercise of a prerogative contrary to the advice and wishes and in spite of the remonstrances of Parliament. The transaction of public business by the King personally or by any other agency than that of his ministers for the time being is in this sense unconstitutional. It would be unconstitutional if the House of Lords were to alter a Money Bill, or if lay peers were to vote upon the decision of an Appeal, or if the House of Commons were to vote money without an application from the Crown, or were to include in their Bill of Supply provisions that related to a different subject.

It has been officially declared* that "Parliamentary legislation on any subject of exclusively internal concern to any British colony possessing a representative Assembly is, as a general rule, unconstitutional." In all these cases there are the two elements, the legality of the one course, and the expedience and usage of the other. Perhaps it may be said that wherever experience and the proved utility of any mode of exercising any discretionary power are such as to raise a reasonable expectation in the public mind that that power will continue so to be used, any deviation from the customary method, which tends to defeat this expectation and rests merely on the ground of actual ability so to deviate, is unconstitutional.

§ 5. It may be thought an inherent defect in our institutions that so great powers are placed in the hands of one person, and that the successful working of the whole political system is dependent upon his willingness to use his power without regard to his own personal inclinations. Such a defect would doubtless exist if there were no influences calculated to direct and determine the Royal will. But of such influences our Constitution in its modern form is full. It deals with the King as with a man possessed of free will, and capable of a reasonable choice. It leaves him free to distinguish between right and wrong; and while it never presumes that he will choose the wrong, it is careful to surround him with every inducement to choose the right. Some of these motives are positive, and some are negative. Some offer distinct inducements to the adoption of the constitutional course; and others take away the inducements to abandon it. By their combined operation that result has

Influences affecting the Royal Will.

* *Per* Lord Glenelg, see May's *Const. Hist.*, ii. 571.

been obtained, which, up to the present time at least, has proved so eminently successful.

The first of these influences is one which, unknown to our old political law, and silently springing up by slow degrees, has largely contributed to the present aspect of the Constitution. It is the political unity of the Cabinet. Of the details of this subject I shall have occasion in a subsequent chapter to treat. At present I have merely to indicate the obvious restraint that such a system places upon the wishes of the King. It might be easy to get rid of a troublesome servant or to overpower his opposition: but it is a different matter when the rejection or the displacement of one minister includes the simultaneous rejection or displacement of all his colleagues. It is a matter of no small difficulty to bring together and to keep together a sufficient number of persons competent, and esteemed by the public to be competent, to conduct the public business of the Crown. If, therefore, the King were to break up such a body, which was on the whole working satisfactorily, for no other reason than some personal disagreement, he would incur a serious responsibility. In such circumstances he would not easily find new servants in whom Parliament would be likely to repose confidence. Thus George the Fourth was often not slow to express his dislike to his ministers, and not choice as to the terms in which he expressed that dislike. But, as it was at the time observed,* "The King is fonder of abusing his ministers than of changing them; for a few hard words cost him nothing, but a great political change could not be made, if at all, without much more trouble, fatigue, and worry to the King than he will like to expose himself." "I do not wonder," wrote Lord Grenville† of

* Buckingham's *Memoirs of George IV.*, ii. 395. † *Ib.*, 23.

the same King soon after his accession, "that he feels hurt at Canning's speech, such as it is reported; but this is not the first occasion, nor will it be the last, in which the Sovereign of this country must suppress such feelings, and bear with the faults of those who on the whole, taking all things together, can serve him most usefully."

I have already pointed out some of the expedients by which all causes of dispute in legislative matters between the Crown and its Parliament are in our modern political system avoided or removed. The same observation will to a great extent apply to the action of the Parliament as a council of superintendence in matters of state. The principal subjects of dispute in former days between the Crown and Parliament, apart from matters of revenue, related to the conduct of ministers of the Crown, or to the granting of supplies, or to foreign policy, or to ecclesiastical affairs. On each of these subjects dispute seems now almost impossible. In our present condition it is difficult to say what questions would have so great a personal interest for the King as to induce him to break the customs that have now grown up, and to incur all the vexation and trouble of a contest with discontented servants leading a hostile Parliament. However strong may have been the affection of former Kings for their ministers, however deeply compromised they may have personally been in those ministers' conduct, they have never been able to resist the pressure for their dismission or their punishment. At the present time, when ministers accept office with the distinct understanding that, when they can no longer maintain friendly relations between the Crown, and at all events the House of Commons, their official connection with the Crown must cease, no hardship is felt in their dismission; and no minister and no King would ever think of engaging in a doubtful and hazardous contest on such grounds only.

The same improvements in the arrangements connected with the Royal revenue which have disabled the Crown from organizing a special Parliamentary support have also, in respect at least of that most fertile of all subjects of dispute—money matters—weakened the motives of the Crown for seeking such support. The mischievous confusion which the Hanoverian connection caused has been terminated, and is not likely to recur; and it has been at all times found that the mere ties of kindred or of affinity between Monarchs are insufficient to control national policy. The only remaining subject that has heretofore led to disagreement is that which relates to the support, or the supposed support, of the national Church. But that subject is rather legislative than executive, and it is not unreasonable to hope that the discussion which the question has received, and the precedent of 1829, may be regarded as having conclusively established the rule that in ecclesiastical as in temporal legislation the deliberate advice of Parliament should prevail.

§ 6. Whatever may have been the circumstances which led to the gradual formation of Parliamentary Government, the cause of its continuance is clear. In practical politics, as in every other art, the great test of excellence is success. But in at least British communities the success of Parliamentary Government does not admit of doubt. As Edward the First found the supplies voted by the representatives of his burgesses more profitable than the tallages at which he assessed their constituents, so experience has shown to later Sovereigns the great advantage to their government of our modern system. Where in former times the only remedy for misgovernment, real or supposed, was a change of dynasty, the evil is now corrected at no greater cost than that of a

Practical operation of Responsible Government.

ministerial crisis. Where in former times serious evils were endured because the remedy was worse than the disease, trivial inconveniences now excite universal complaints and meet with speedy remedy. Where formerly ministers clung to office with the tenacity of despair, and rival statesmen persecuted each other to the death, the defeated Premier now retires with the reasonable prospect of securing, by care and skill, a triumphant return; and both he and his successors mutually entertain no other feelings than those to which an honourable rivalry may give rise. Where formerly every subsidy was the occasion of the bitterest contention, and was given at last grudgingly and with mistrust, the House of Commons has never since the Revolution refused to the Crown the maintenance of a single soldier or reduced the salary of a single clerk. Whatever sums the Crown has asked for the public service the Commons have, with scarcely an exception, voted without deduction. "The people," says Sir T. E. May,* "may have some grounds for complaining of their stewardship, but assuredly the Crown and its ministers have none."

Nor has this beneficial influence been confined to the mother country. It has been felt in every colony to which the principle has been applied. In these cases the rapidity of the results is not less marvellous than their magnitude. "None but those who have traced it," Mr. Merivale truly observes,† "can realize the sudden spring made by a young community under its first release from the old tie of subjection, moderate as that tie really was. The cessation, as if by magic, of the old irritant sores between colony and mother country is the first result: not only are they at an end, but they seem to leave hardly any traces in the public

* *Const. Hist.*, i. 470. † *Colonization and Colonies*, 641, 2nd ed.

mind behind them. Confidence and affection towards the 'Home,' still so fondly termed by the colonist as well as the emigrant, seem to supersede at once distrust and hostility. Loyalty, which was before the badge of a class suspected by the rest of the community, becomes the common watchword of all; and with some extravagance in the sentiment there arises no small share of its nobleness and devotion. Communities which but a few years ago would have wrangled over the smallest share of public expenditure to which they were invited by the executive to contribute, have vied with each other in their subscriptions to purposes of British interest, in response to calls on humanity or munificence for objects but indistinctly heard of at the distance of half the world."

Responsible Government in the Colonies

§ 7. I may notice, although rather from the misconception that sometimes attaches to the subject than from its actual difficulty, that peculiar form of Parliamentary Government which exists* in the British colonies. The powers of the Crown extend to every part of Her Majesty's dominions, and are exercised by Her Majesty's servants under the superintendence of the Parliament of the United Kingdom and with its approval. But, from the nature of the case, the administration and the superintendence which are suited to the United Kingdom are insufficient for differently circumstanced and remote and varied communities. Accordingly Her Majesty exercises her Royal functions in each colony by an officer specially appointed for the purpose. In the exercise of the discretionary powers of the Crown, that officer is instructed to guide his discretion on the same principles as those which, in all other circumstances,

* See Lord Elgin's *Letters*, 112–116.

regulate the discretion of the Crown. It is the duty of the Governor to administer the affairs of his colony by the aid of ministers, who act under the superintendence, and with the approval, of the Colonial Parliament. His compliance with the advice of these ministers is limited to matters of discretion, and he is bound to decline any proposal that is contrary to law. Neither a Governor nor any other subject can be freed from the personal responsibility for his acts or can be allowed to excuse a violation of the law on the plea of having followed the counsels of evil advisers. This responsibility of the Governor is enforced by the authority of the Home Government, and if need be by the courts either of the colony* or at Westminster. So far there is nothing peculiar in this office. But even in matters of discretion, and this is the distinctive feature of Colonial Parliamentary Government, the Governor is not absolutely free to follow the counsels of his political advisers. The Queen, indeed, may without reference to any external considerations accept or reject the advice of her ministers. But a Governor cannot do so. He is not even a Viceroy. Much less has he any independent power. Although he is the first subject in the colony over which he presides, and is entitled to all the consideration which the great confidence imposed in him by his Sovereign demands, he is in strict law merely an agent of the Queen, exercising in her name and on her behalf, under certain strict instructions, some of the Royal prerogatives. His authority is derived from his commission, and is limited to the powers thereby expressly or impliedly entrusted to him.† He, like every other agent, has from the very nature of the case a double relation, one to his principal, another to the party with whom

* Musgrove *v.* Pulido, 5 *App. Cas.*, 102. † *Ib.*

he transacts the affairs of his principal. But this double relation is not inconsistent with the practical operation of Parliamentary Government. As long as the Governor is able in conformity with his instructions to follow the advice of his ministers, no question can arise. If from any cause, whether originating in his instructions or not, he cease to have confidence in his advisers, he is entitled to seek other counsel; and if he be supported in this course by the Colonial Parliament, the matter is still free from difficulty. If, however, the Colonial Parliament refuse to support his new advisers, the interference of the Imperial Government becomes necessary. If that Government decide against the Governor's conduct, the controversy is at an end. If it support that conduct, the contest is transferred from the agent to the principal, from the Governor to the ministry and the Parliament of Great Britain. In no case, then, is the Governor personally responsible to the Colonial Parliament for the policy he pursues. If he agree with his advisers, the praise or the blame, so far as the colony is concerned, is theirs; if he disagree with them, the praise or the blame rests with his official superiors.

A late able writer* has pointed out a distinction in colonial political nomenclature which here deserves notice. The terms legislature and parliament are not equivalent. The former means a body whose functions are purely legislative. The latter includes both the power of legislation, and also the supervision of the Executive Government. Thus there was a Legislature of Victoria before the passing of the Constitution Statute. But by the first Act† passed under that statute the new bicameral legislature assumed the style of the Parliament of Victoria. The use of this new name did not proceed from the mere desire for

* Todd, *Parl. Gov. in the British Colonies*, 462–464.

† 20 Vict., No. 1, s. 3.

a high-sounding title. It appropriately marked the commencement of a new departure in our political history. The term legislature is always used in Imperial statutes to denote colonial representative assemblies ; not, I think, for the purpose of distinguishing, as Mr. Todd suggests, between the colonial and the Imperial legislative bodies, but because the supervision of the Executive is granted, not by statute, but by prerogative. An Act of Parliament may create a body with legislative powers, whether plenary or limited, or, in other words, a legislature. But, according to the fundamental distinction between law and discretion, the consent of the Crown to exercise its discretion in a certain way is not and cannot be within the scope of any legislation. Such a consent is essentially a matter of prerogative. When, therefore, a grant of responsible government—that is, a promise to exercise the prerogative exclusively by the advice of ministers who possess the confidence of the Legislature—has been made by the Crown to any legislative body which has been lawfully created, that body may justly take the style and title of a Parliament. The assumption of this title aptly marks the highest degree of colonial self-government.

CHAPTER VI.

THE CONTROLLING POWER OF PARLIAMENT.

The origin of Parliamentary control.

§ 1. The transfer of the supreme control of the Executive Administration from the Crown to the House of Commons forms what Lord Macaulay* has called "the great English Revolution of the seventeenth century." The limits of that century mark with sufficient precision the beginning and the end of this memorable contest. In the first year of the century the Commons won their great victory in the case of the monopolies. At the close of the same century the Revolution, and the usages to which it gave rise, had finally secured the controlling authority of Parliament. There had not, indeed, been wanting at a much earlier period traces of that interference of Parliament which was afterwards matured into our present system. Mr. Hallam† points to the deposition of Longchamp, the Chancellor and Viceroy of Richard the First, by the assembled barons, during the absence of the King in the East, as the earliest instance of the responsibility of ministers to Parliament. I have already mentioned a still more remarkable case in the reign of Edward the Second. Whatever we may think of the value of these precedents, there is no doubt that in later times, especially under the Lancastrian Kings, the House of Commons

* *Hist. of Eng.*, i. 193. † *Middle Ages*, ii. 322.

interfered with greater or less freedom in affairs of state. Edward the Third, to ensure a heartier support and more abundant subsidies, was careful to consult the Commons concerning matters of war and peace. At the close of his long reign a dissension in the Court seems to have suggested to one of the parties the alliance of the Commons ; and the Commons, encouraged and directed by the heir-apparent and his supporters, ventured upon remonstrances that touched even the domestic relations of the King. The fierce contest with Richard the Second and the insecure throne of Henry Bolingbroke tended to strengthen the power of the Commons. But the voice of Constitutional Law was silenced by civil war ; and at the close of that war the pretensions of Parliament were dwarfed by the overshadowing greatness of Tudor Royalty.

In the time of Elizabeth the spirit of the Commons had revived, and they did not hesitate to tender their advice to their Queen upon the very points on which she was most sensitive. One of these subjects arose from the great religious movement which then stirred to their innermost depths the souls of men. The other was occasioned by the bitter memories of the civil war and the precarious health of the childless Queen. The Commons freely remonstrated on the oppressive rule of the Bishops and the general administration of the Church. With even greater earnestness they pressed the Queen to make some provision for the succession to the throne. But her ecclesiastical supremacy was to Elizabeth the most precious pearl of her Crown. In its defence her prerogative was stretched to the farthest limit that in the course of her long reign she ventured to extend it, and her personal energy was exerted to the uttermost. The succession to the throne was with her a still tenderer subject. It was the great mystery of her statecraft. It was the secret in the preservation of which she conceived

her power, her dignity, and even her personal safety to be involved.* She peremptorily commanded her Parliament not to meddle with religious concerns, or with affairs of state. She returned, with unexampled honesty, a subsidy that was voted in expectation of some settlement to the succession. She conducted her administration for five years without recurring to the aid of a Parliament that favoured the Puritans and criticised her administration. But the Commons were resolute. It was in their opinion one of their ancient privileges and liberties to deliberate on subjects affecting the Commonwealth. These privileges they were not disposed to forego. They did not indeed succeed during the Queen's reign in effecting either an ecclesiastical reform or a formal settlement of the succession. But in other matters of hardly less moment they fared better. They had frequently complained of various grievances in the civil government of the Queen, and especially of the enormous abuse of monopolies. The reception of these complaints illustrates the progress of the House towards the admission of its disputed claims. In 1571 † the Lord Keeper severely reprimanded those "audacious, arrogant, and presumptuous" persons who had called in question Her Majesty's grants and prerogatives, contrary to their duty and place, and contrary to Her Majesty's express admonition, spending much time in meddling with matters neither pertaining to them nor within the capacity of their understandings. In 1597 ‡ the Queen merely expressed the hope that her dutiful and loving subjects would not take away her prerogative, "which is the chiefest flower in her garden and the principal and head pearl in her crown and diadem," but would

* Hallam's *Const. Hist.*, i. 210, 251.
† 1 *Parl. Hist.*, 760.
‡ *Ib.*, 905.

leave the matter to her disposition and the touchstone of the law. In 1601 * it was announced that the objectionable patents would be revoked, and no others granted.

The strength which the Commons had thus acquired encouraged them in their contests with the Kings of the House of Stuart. I need not now detail the mode in which the contest was conducted. The force which the Commons employed was the same force which in all preceding contests their forefathers had used. The power of the purse was the great ally of English liberty. By the dexterous use of this power the Parliament had from the death of Elizabeth to the eve of the civil war made continual encroachments on the province of the Crown. Nor were the lessons of the Long Parliament, and the authority which it exercised, soon forgotten. The Cavaliers, who hated the Puritan name, followed the Puritan policy. Charles the Second, more extravagant than his predecessors, wanted money more constantly and more urgently than even they had done. Parliament alone could lawfully grant him money. "They could not," says Lord Macaulay,† "be prevented from putting their own price on their grants. The price they put on their grants was this: that they should be allowed to interfere with every one of the King's prerogatives; to wring from him his consent to laws which he disliked; to break up cabinets; to dictate the course of foreign policy; and even to direct the administration of war."

The very nature of the Revolutionary Government, and the precarious tenure of the Crown, tended to strengthen the authority of Parliament. At the same time the special circumstances of the case exercised a similar influence. The great supporters of the Crown, the men of divine

* 1 *Parl. Hist.*, 933. † *Hist. of England*, i. 193.

right and indefeasible prerogative, were in opposition; and in their eagerness to embarrass the King, they forgot their boasted loyalty and their devotion to the Crown. Thus while one of the great parties supported on principle the pretensions of Parliament, the other of those parties with all a convert's zeal pressed these pretensions to the utmost against a King whom they disliked. In addition to these circumstances, the want of success which marked the greater part of William's reign, and the treachery and incapacity of his servants which marred his administration, gave but too good cause for the interference of Parliament. To William such interferences were often very acceptable. They strengthened his hands for the necessary reforms. At the close of his reign, the right of inquiry by either House into every part of the Executive Government, and the right of criticism and advice consequent upon such inquiry, were firmly established. Ten years after the death of William two incidents occurred, which show both the consistency which the principles of our present constitutional system were beginning to assume and the obligation which they owe to the malcontent friends of prerogative. In 1711, in a debate in the House of Lords,* the Earl of Rochester, the chief of the Tories, loudly protested against the practice of attributing to the Queen the responsibility of public affairs; and insisted that "according to the fundamental constitution of this kingdom, ministers are accountable for all." In the same year the Earl of Nottingham,† another leader of the same party, proposed an amendment upon the Address, expressive of views very unacceptable to the Queen respecting the terms on which the War of the Succession might be concluded. In opposition to this amendment some "officious courtiers"

* 6 *Parl. Hist.*, 972. † *Ib.*, 1038.

urged that peace and war belonged as prerogatives to the Crown; and that it was therefore not proper to offer advice on these subjects until it was asked. This view was rejected with indignation; and it was asserted that no prerogative could be above advice, and that such advice was not only constantly given, but was in fact the very end specified in the writ by which Parliament was summoned.

§ 2. "I have always understood," said Mr. Burke* in the House of Commons, "that a superintendence over the doctrines as well as the proceedings of the courts of justice, was a principal object of the Constitution of this House; that you were to watch at once over the lawyer and the law; that there should be an orthodox faith, as well as proper works; and I have always looked with a degree of reverence and admiration on this mode of superintendence. For being totally disengaged from the detail of juridical practice, we come, something perhaps the better qualified, and certainly much the better disposed, to assert the genuine principle of the laws; in which we can, as a body, have no other than an enlarged and public interest. We have no common cause of a professional attachment or professional emulations to bias our minds; we have no foregone opinions, which from obstinacy and false point of honour we think ourselves at all events obliged to support—so that with our own minds perfectly disengaged from the exercise, we may superintend the execution of the national justice; which from this circumstance is better secured to the people than in any other country under heaven it can be. As our situation puts us in a proper condition, our power

The control by Parliament of the judges.

* *Works*, vi. 137.

enables us to execute this trust. We may, when we see cause of complaint, administer a remedy; it is in our choice by an Address to remove an improper judge; by impeachment before the Peers to pursue to destruction a corrupt judge; or by bill to assert, to explain, to enforce, or to reform the law, just as the occasion and necessity of the case shall guide us. We stand in a situation very honourable to ourselves and very useful to our country, if we do not abuse or abandon the trust that is placed in us."

Of the two former kinds of control mentioned in this passage the examples, in modern times at least, are very rare. Instances are indeed recorded in our earlier history of severe punishments inflicted upon judges for various forms of misconduct. But such a duty, when its performance is unhappily required, belongs exclusively to Parliament. Judges differ in one remarkable respect from other functionaries. No judge is liable to any proceedings, civil or criminal, before any ordinary tribunal for any act or omission in the execution of his judicial office. Except in two instances, the refusal of a writ of *Habeas Corpus* and the refusal of a Bill of Exception, or a false statement in support of such refusal,* no judge,† even though a wilful and corrupt design be distinctly alleged, can be drawn into question before any other judge for his official conduct. The only remedy, therefore, against a delinquent judge is by impeachment. It was for misconduct in his office as Chancellor that in the case of Lord Bacon this long-disused remedy was revived. The evil days of James the Second gave rise to several proceedings of this kind. But since the Revolution only one impeachment of a judicial functionary has taken place. In the reign of George the First Lord Chancellor Macclesfield was convicted of the

* 3 Stephen's *Commentaries*, 615. † 12 *Reports*, 25.

sale of offices and other misconduct in his court, and was heavily fined. So satisfactory has the general administration of justice become that during the same period Parliament has never found it necessary to exercise even the milder power that it possesses, the power of addressing the Crown to remove an unfit judge. Complaints have sometimes been made; and in two or three instances learned judges have prevented further proceedings by a timely resignation. Even in the case of the Colonial Bench, where the power of amotion is greater than in the United Kingdom, no instance of an amotion under the Acts which regulate this power* occurred until 1829.† The same gentleman who in that year raised in Canada a question upon these Acts followed with curious precision the precedent of his own case sixteen years afterwards in Australia.‡ There was a case in 1847 § where the amotion of a judge in Tasmania was upheld; and another where the amotion of a judge at the Cape of Good Hope was set aside as frivolous. Some other cases, although not of special importance or of recent date, have occurred. But there has rarely been so large a body of men whose conduct during so long a period of time has been so free from blame as the judges of the British Crown.

The third mode in which Parliament exercises a control over judicial proceedings is by the exercise of its legislative functions. So far as this action of Parliament relates to an avowed alteration of the law it requires no special notice. The Legislature, however, has occasionally aimed at something more; and has taken upon itself the duty not of

* 22 Geo. III. c. 75, and 54 Geo. III. c. 61.

† Per Lord Lyndhurst, *Willis v. Gipps*, 5 Moore, P. C. C. 388.

‡ *Ib.*, 379.

§ *Montague v. Governor of V. D. Land*, 6 Moore, 489.

‖ *Cloete v. The Queen*, 8 Moore, 484.

enacting what the law shall be, but of declaring what it is. A curious example is found in the famous Statute of Treason,* which after defining a variety of treasons provides that if any other case of supposed treason should arise the justices shall not proceed to judgment "until the cause be showed and declared before the King and his Parliament whether it ought to be judged treason or other felony." This provision, however, related to the judicial character of the High Court of Parliament as it was at that time understood. A later, and perhaps a more pertinent, example is the case of Mr. Fox's Libel Act.† That measure had twenty years before it became law been introduced by Mr. Dowdeswell in the usual form of express enactment, but was lost because Lord Chatham insisted that its form should be declaratory.‡ Lord Campbell expresses his satisfaction that this Act was passed in a declaratory form. But whatever may be the political merits of that measure, it is too much to say that the uninterrupted course of judicial decisions for half a century did not amount to law. If Lord Mansfield's judgments were wrong, they could have been reversed. But Mr. Fox and his supporters, while they acquiesced in these decisions, not only altered the law but did so in such a manner as to intimate that these decisions had been erroneous. Declaratory enactments are proper when the object is to give a new promulgation of the Common Law or to explain any doubts as to the intention of the Legislature in any previous statute. So far as past transactions are concerned, a declaratory act can have no practical importance. It does not unmake the law which the judges pronounced; and its retrospective operation amounts merely to an expression of unauthoritative opinion.

* 25 Edw. III. St. 5, ch. 2. † 32 Geo. III., c. 60.

‡ Massey's *History of England*, ii. 130.

§ 3. In the struggle in which James the Second sought to recover his lost crown, the city of Londonderry became a position of considerable military importance. Its charge had been entrusted to Colonel Lundy. Upon the approach of the French and Irish forces, the governor showed such incapacity, if it were not treachery, that the besieged citizens were forced to depose him, and by their unaided efforts to defend their walls. The House of Commons in 1689 appointed a committee of inquiry into the miscarriages of the Irish war, and especially the delay in the relief of Londonderry. Their investigation resulted in a request to the King that Colonel Lundy should be sent to England to be tried for the treason with which he was charged. Mr. Hallam observes* that this is the earliest precedent in the journals of the House of Commons for so specific an inquiry into the conduct of a public officer, especially one in military command. Since that time, however, the right has been repeatedly exercised. The power to compel the attendance of witnesses and the production of records and other documents is incidental to this right of inquiry, and is enforced by the aid of Parliamentary Privilege. But, besides this power of inquiry, it is the right and the duty of the Houses of Parliament to advise the King upon the exercise of every branch of his prerogative. Concerning the declaration of war or the conclusion of peace,† concerning the appointment, the retention, or the dismission of servants of the Crown, concerning the conduct of such servants in the discharge of their official duties, concerning the dissolution of Parliament, concerning the bestowal of marks of Royal favour, concerning all matters relating to revenue and to the expenditure of revenue, concerning all

The control by Parliament of the Executive.

* *Const. Hist.*, iii. 142. † 2 Hatsell, 308.

matters relating to trade, in a word concerning every subject of public interest, the House of Commons from time to time as occasion may require tenders its advice to the Crown, and seldom fails to obtain a gracious allowance.

It was during the great Parliamentary contest of 1784, to which I shall presently more fully refer, and which gave rise to discussions upon many points of Constitutional Law, that this superintending power of either House of Parliament was for the last time seriously disputed. By an Act of Parliament the Directors of the East Indian Company were restrained from the acceptance of bills drawn from India beyond a certain amount, without the consent of the Commissioners of the Treasury. It was found that bills to the amount of two and a half millions sterling had been drawn upon the Company by their servants, and that it was expected that other bills to the amount of upwards of two millions would soon arrive.* At the same time the affairs of the Company were notoriously unsatisfactory. Accordingly the House of Commons resolved that the Lords of the Treasury ought not to give their consent to the acceptance of any bills drawn from India until the House should be satisfied that sufficient means could be provided for their payment, or until the House should otherwise direct. The Lords, who were prepared to support the Crown in the struggle which was then raging, took the occasion of this resolution to assail the proceedings of the Commons. They accordingly passed a resolution denouncing as unconstitutional "an attempt of any branch of the Legislature to suspend the execution of law by separately assuming to itself the direction of a discretionary power which by Act of Parliament is vested in any body of men to be exercised as they shall think expedient." The House of Commons

* 24 *Parl. Hist.*, 267.

appointed a committee to search the journals for precedents. This committee reported that there were precedents from the time of Charles the First, and carried on to that day, by which it appeared that the House interfered by an authoritative advice and admonition upon every act of Executive Government without exception. The Commons accordingly passed several resolutions, denying that they had assumed any right to suspend the execution of law, and asserting that "it is constitutional and agreeable to usage for the House of Commons to declare their sense and opinions respecting the exercise of every discretionary power which, whether by Act of Parliament or otherwise, is vested in any body of men whatever for the public service."

In this case it was not contended that the vote of the House of Commons had any binding force. The supporters of that vote declared that it amounted, and was designed to amount, to nothing beyond advice.* They insisted that the House had never attempted to assume a right to suspend the execution of law or the exercise of discretionary powers; but that it did claim a right to pass monitory resolutions on the exercise of such powers. If the persons who had the legal power did not accept the advice or the warnings of the resolution, their acts would still be valid in law, whatever might be the consequence to the public, or however such persons might be amenable for their conduct to the censure of the House. Thus, in 1689, the House of Commons resolved that a writ of error is of right and not of grace: but both then and ever since the courts have held and rested upon the opposite view. In 1781† the House of Commons, upon the reports of two select committees, passed resolutions for the immediate

* 24 *Parl. Hist.*, 552. † Massey, *Hist. of Eng.*, iii. 183.

recall of Warren Hastings and Sir Elijah Impey from the offices of Governor-General and Chief Justice of India respectively. The Chief Justice, who held office from the Crown, was accordingly recalled by the authority of the Secretary of State. But the East India Company directors reminded the House that the right of appointing and removing the Governor-General was by Act of Parliament vested in them, and that they were more fully informed of the merits and demerits of the Governor-General than the House was. Accordingly, Mr. Hastings continued in office until the expiration of his term of office in 1785. In these cases the legal power of action and of inaction, and the legal responsibility for the exercise of that power, rested not with the Commons but with other persons designated by law. Such power, however, did not exclude the right of criticism or of suggestion. The real foundation, as Mr. Fox truly observed,* for any interference of the Commons in such circumstances is the deference with which their opinion is received.

There can, indeed, be no doubt that that Supreme Council, which advises in every matter of state the Crown itself, may well criticise the conduct or direct the discretion of any servants of the Crown or of any public board. A remarkable instance of the expression of Parliamentary opinion as to the duties of officers, and of the respect which is paid to such an expression, is found in the circumstances connected with the commencement of the final illness of George the Third. On a resolution of both Houses the Chancellor did not hesitate to affix the Great Seal without the express command of His Majesty to Commissions for the formal opening of Parliament and for assenting to the Regency Bill. On the same occasion Lord Grenville, as I

* 24 *Parl. Hist.*, 567.

have already had cause to observe, considered it his duty to refuse to issue any money upon the only authority that could in the circumstances be obtained, a Treasury Warrant. He intimated, however, his readiness to act, and ultimately did act, upon a resolution of the two Houses. Such a resolution would not afford a defence against any proceedings for any dereliction of duty or its consequences; but it amounts to a pledge by Parliament to secure, by recommending to the Crown a Bill of Indemnity, the officer who unlawfully obeys its instructions.

§ 4. Although in matters of state Parliament possesses so unlimited a power of criticism, it has not the smallest share of direct authority. It may censure and complain of any proceeding in which the prerogative has been improperly exercised. It may remonstrate against any anticipated act of the Crown. It may recommend the adoption of any line of policy. It may express its opinion that any officer or any public body to whom any discretionary power is entrusted by law should exercise that power in a particular manner. But these powers are merely acts of admonition. The legal responsibility of the action still remains with the person in whom the discretion is vested. It is the duty of Parliament to advise but not to command the Crown. It has no correspondence* with any foreign State. It does not communicate with any Colonial Legislature. It cannot of itself issue orders even to the doorkeepers of any public departments. It has not the appointment of its own officers.† The Clerk of the Parliaments, the Gentleman Usher of the Black Rod, the Sergeant-at-Arms, the Under Clerk of the Parliaments to

The controlling action of Parliament is indirect.

* Todd's *Parl. Govt.*, i. 607–609. † May's *Parl. Practice*, 206.

attend the Commons, and their respective subordinates, all hold their offices from the Crown. They are the servants of the King, whom he directs to attend upon his Peers and his faithful Commons. The functions of Parliament, so far as they relate to the Executive Government, are critical, not administrative. Its influence is altogether indirect. Parliament freely tenders its opinion and advice respecting every part of administration, but it does not dictate to the King the precise manner in which his prerogative shall be employed. It does not even presume to indicate the successor to a minister whose removal it recommends. The utmost that in such circumstances it has ventured to do is to ask, as it did in 1784 and again in 1812, for the formation of a ministry on a comprehensive basis; or by some similar expression to intimate its desire for the success of some political negotiation then either expected or known to be pending.

On several occasions in our history Parliament sought to establish a direct control over the Executive. Like many other assemblies in similar circumstances* it has claimed and sometimes exercised the power of nominating by its express vote the principal officers of the Crown. In the Great Charter of John provision is made for the election by the Barons of twenty-five persons from their own number who were to watch over the faithful execution of the Charter; and, if need were, to enforce it by seizure of the King's lands and castles. On several occasions in the reigns of Henry the Third and of Edward the Second and of Richard the Second, the Parliament interfered with the nomination of the King's Council and the great officers of state. In 1642 one of the demands of Parliament was that all appointments to the Privy Council

* See Guizot, *Hist. Civil. in Europe*, i. 108.

should be made with the consent of both Houses; and that all matters of state should be decided by a majority of this Council. In no instance has this direct action of the Legislative Chambers been successful. The selections were ill-judged, and the conduct of the officers was unsatisfactory. But in this case, as in many other cases in politics, the object which the obvious and direct method failed to secure has been attained by indirect means. The propositions, of which to the Royalists of 1642 the acceptance seemed a worse evil than civil war, sought only to enact as positive law that which without any such law is now our ordinary practice. Every department of the state is directed by the confidential servants of the Crown; but it is the duty of these servants to keep their policy and their conduct in general conformity with the views of Parliament. "If," says Lord Macaulay,* "the Parliamentary majority is dissatisfied with the way in which patronage is distributed, with the way in which the prerogative of mercy is used, with the conduct of foreign affairs, with the conduct of a war, the remedy is simple. It is not necessary that the Commons should take on themselves the business of administration; that they should request the Crown to make this man a bishop and that man a judge; to pardon one criminal and to execute another; to negotiate a treaty on a particular basis, or to send an expedition to a particular place. They have merely to declare that they have ceased to trust the ministry and to ask for a ministry that they can trust."

§ 5. The advice which Parliament tenders to the King regarding the conduct of his ministers or his retention of their services is not always hostile. There are occasions on

* *Hist. of Eng.*, iv. 436.

The special approbation by Parliament of the Executive.

which either House has thought it expedient to assure the King of its approval of the measures that he has been advised to adopt, or of its unabated confidence in his present counsellors. Such occasions are, however, of comparatively rare occurrence. The confidence of Parliament is usually rather inferred from its conduct than expressed by open declarations. Parliament, as long as a ministry possesses its confidence, will give a general support to the Executive Government, and will receive favourably the legislative measures which the ministry proposes for its consideration. It will reject every motion that is calculated to reflect upon the ministry, and every bill which tends to embarrass it. In such circumstances it is unnecessary to ask for any special expression of confidence; and it is seldom expedient* that the Legislature should select some particular branch of the public policy of the Government, and to the exclusion of all the other branches mark that single portion with its approbation.

Although the confidence of Parliament is better shown by its acts than by its words, there have been instances in which it has expressed a favourable opinion either of the Administration generally or of some particular part of its policy. The cases in which such votes have been passed are where a hostile motion has been made in one House and is in that House met not by a direct negative but by an expression of positive approval; or where a hostile vote has been passed by one House, and an appeal, as it were, is made from that vote to the other House; or where some circumstances unconnected with their executive policy—as, for example, the rejection of an important bill—are likely to lead to the resignation of ministers. The most remarkable

* See Sir Robert Peel's *Speeches*, iii. 605.

example of a motion of condemnation turned into a triumph occurred in 1823. A motion was made in the House of Commons severely censuring Mr. Canning's foreign policy in reference to the affairs of Spain. For this censure the friends of the ministry proposed to substitute a highly laudatory address; and the amendment was carried by an immense majority. The occasion, however, on which votes of confidence are usually asked from one House is to neutralize the effect of hostile proceedings in the other House. In 1784 the House of Lords came to the support of the King and Mr. Pitt in the unequal contest which the latter was waging against a hostile House of Commons. The form of this vote was rather that of confidence in the King than in his ministers. It declared His Majesty's undoubted right to appoint his own ministers, and expressed the full confidence of the Lords in His Majesty's wisdom in exercising the prerogative. I do not recollect any other instance in which the Lords have expressed themselves in a similar manner. But there are several cases in which, after the Lords had disapproved some part of the policy of the Government, the House of Commons adopted votes expressive of its confidence in ministers. In such circumstances, indeed, if the ministry desire to remain in office, a counter-vote in the Commons either directly or by implication should be obtained. But the principles which govern this case, and the precedents by which they are confirmed, require separate discussion.

Connected with this subject, and yet I think distinguishable from it, are the votes of confidence passed by the House of Commons in Lord Grey's ministry when the second Reform Bill was lost in the House of Lords; and again when the passing of the third Bill was endangered. On those occasions the House of Lords did

not find fault with His Majesty's servants or any part of their conduct. They merely refused to consent to a certain legislative measure, or at least to consent to it in the form in which it was submitted to them. Such, however, was at that time the state of public feeling that the ministry declined the responsibility of continuing to administer public affairs. The House of Commons, which entirely sympathized with the ministerial project, sought to strengthen Earl Grey's hands and prevent the formation of an Anti-Reform Ministry. It adopted vigorous resolutions expressive of its regret at the change in His Majesty's Councils and its unaltered confidence in his late advisers. The ministry accordingly on the first occasion remained firm ; and on the second, after their resignations had been accepted, were recalled.

§ 6. Since Parliament thus acts as a council of advice to the Crown on all questions of general policy, and since the adoption of its advice is secured by the appointment to the high offices of state of persons in whose political principles it sympathizes, and in whose judgment and integrity it has confidence, it follows that Parliament may express its disapprobation of any ministry without any special cause of complaint. The mere distrust of the servants of the Crown, on whatever grounds that distrust is felt, is sufficient to entitle Parliament to ask for a ministry on which it can rely. The fact that a ministry is unable to secure the confidence of Parliament, and that its continuance in office is likely to disturb the harmony that should exist between the King and his Supreme Council, is sufficient to justify the Crown in a change of its advisers. This principle, which had previously been vehemently

Parliament needs not assign reasons for its mistrust of ministers.

denounced by Sir Robert Walpole,* was called in question in the contest of 1784. The King, in answer to one of the addresses of the House of Commons complaining of his new ministry and praying for a change, assigned as a ground of his refusal to grant the request that "no charge or complaint had been suggested against his present ministers." In the debates of the time Mr. Pitt contended that the independence of the Crown, and even its existence, were endangered, if its prerogative of naming ministers were usurped by the Commons, "or if (which is precisely the same thing) its nomination of men is to be negatived by us without stating any one ground of distrust in the men, and without suffering ourselves to have any experience of their measures." We have already seen that the nomination of ministers by the Commons is not precisely the same thing as its objection to any ministerial appointment. But there can be little doubt that Mr. Pitt's doctrine is untenable. Parliament has a preventive as well as a vindictive power. If it perceive the King in danger of being misled by weak or by wicked counsellors, it is bound to interpose its advice without waiting for the actual occurrence of the mischief that it has, or thinks that it has, cause to anticipate. It votes large sums for the public service and duly secures their appropriation; but it may reasonably require to be satisfied that the agents by whom these moneys will be expended are men not merely of character, but of capacity and skill. The question of capacity or of incapacity is one of opinion, and admits also of various degrees. Parliament would, therefore, be excluded from tendering any advice upon such questions, if it were required to prove the absolute inefficiency of one ministry or the relative superiority of another. If Parliament, when it

* See Lord Stanhope's *Hist. of Eng.*, iii. 75.

advised a change of ministry, were bound to accompany such advice with a stated charge, the King would be obliged to hear and determine the sufficiency of the charge. Such an obligation is contrary to the principles of modern administration. The fundamental principle of that policy is that the discretion of the Crown shall always be exercised in conformity with the wishes of the nation. This power of the King to change his servants who hold their offices during pleasure is undisputed. The question, therefore, is, whether His Majesty will exercise his power in conformity with his own personal opinion or with the advice of his Parliament. Modern practice has placed the matter beyond dispute. The King of England must often say what the sorrowing King of Gath said to the departing David,* "I have not found evil in thee since the day of thy coming unto me unto this day: nevertheless the lords favour thee not."†

* 1 Sam. xxix. 6.

† For the subject discussed in this section see the following authorities :— Burke's *Works*, iii. 134; Hallam's *Middle Ages*, iii. 71; Massey's *Hist. of Eng.*, ii. 236; Lord Russell's *Life of Fox*, ii. 54-89.

CHAPTER VII.

THE HARMONY OF THE SEVERAL POWERS IN THE STATE.

How variances between the Crown and Parliament are settled.

§ 1. We have seen that the prerogatives of the Crown are administered through certain great officers of state; and we have ascertained the respective rights in relation to these officers of the Crown and of Parliament. The King has the undoubted right to appoint and to retain in his service any ministers that he thinks fit. His Parliament has a right equally indisputable to advise him to dismiss the ministers thus appointed. If the King decline to accept that advice, the harmony between the Crown and the Parliament, between the Executive and the Legislature, is at an end. In such a case the King has no other course than to dismiss the Parliament whose advice he no longer finds suitable to his requirements. But even in former times the Government of the country could not be conducted for any considerable time without a Parliament; and under our present arrangements an annual session is absolutely necessary. Experience has fully shown that penal dissolutions, when the public mind is bent upon any object, only serve to exasperate the quarrel. It is therefore understood that if the constituent body support the representative body, if the new House of Commons remain of the same opinion as its predecessor, that opinion shall prevail. Ministers must yield to Parliament, and Parliament

is not to be new-modelled until it is fitted to the purposes of ministers. The opinion of the House of Commons as existing at any particular time may be disregarded, but the opinion of that House as a branch of the Constitution is conclusive.* Although provision is thus made for the final adjustment of differences between the Crown and the Parliament, such differences are in themselves a disturbance of the Constitution. The normal action of the political system is during their continuance suspended. Thus the speedy settlement of such differences is hardly less important than their satisfactory settlement. When, therefore, an appeal to the country is about to take place, both the existing Parliament should be dissolved and the new Parliament should be convened with as little delay as possible. Except by special agreement, and for the acknowledged convenience of the public service, the ministry should not, after a hostile vote, bring before Parliament any important business ; and supplies should be granted not for the whole year but for six months, or some shorter period.†

All these subjects were discussed in, and are supposed to have been settled by, the great controversy of 1784. In the early part of that year, much against the wishes of the King, a Coalition Ministry was formed by Mr. Fox and Lord North. This ministry, with the King's consent, brought into the House of Commons a bill for the better government of India. During the progress of this bill the King's views respecting it underwent a change, but he had no communication with his ministers on the subject. When the bill reached the House of Lords His Majesty authorized Earl Temple, with whom he had been in consultation, to make it privately known

* Lord Russell's *Life of Fox*, ii. 95.

† See Sir Robert Peel's *Speeches*, iii. 778, 786.

that the King would regard as a personal enemy every Peer who voted for the bill. The bill was accordingly rejected, and the King immediately dismissed his ministers and formed a new administration under Mr. Pitt. The House of Commons in which the dismissed ministry commanded a large majority, condemned in no measured terms the whole transaction ; repeatedly declared its want of confidence in the new ministers, and requested the King to remove them. The King replied, as we have already seen, that no charge had been made against his ministers ; and intimated his belief that the sentiments of the House were not shared by the country. The House angrily protested against the dissolution which the latter remark suggested, and had previously endeavoured by postponing the supplies to secure itself against such an event. During this contest, which lasted from December to the latter part of the following March, a dispute, to which I have already referred, arose between the two Houses upon an objection taken by the Lords to an expression of opinion by the Commons respecting the exercise of a certain discretion entrusted by statute to the Treasury. Ultimately, on the 24th March, 1785, Parliament was dissolved without an Appropriation Act. At the elections the Whig party was utterly routed ; and Mr. Pitt commenced, with an immense majority, his long and famous administration.

Apart from the conduct of the King to his ministers, this case raises numerous questions. Must Parliament, if it object to a ministry, assign reasons for its objection? May the House of Commons express its opinion as to the mode in which a public body should exercise its lawful discretion? May the King attempt to influence in any private way the proceedings of either House? Does the appointment of the First Minister rest with the

Crown exclusively, or is that officer elected by the leaders of the prevailing party? May Parliament be dissolved against its will during the currency of a session? May it be dissolved without an Appropriation Act? Is the result of the elections conclusive as to the continuance of the ministry? Of the first two questions I have already treated. On the third I shall presently offer some remarks. The claim to elect a Premier has long been abandoned. It was doubtless but a crude form of the principle that ministers are political officers, and not mere personal dependents of the Crown. This claim, too, was never openly made; it was a plain encroachment on the prerogative, and at that time even the boldest hesitated to express on such a subject what was uppermost in their minds. It would be needless to notice this obscure and forgotten controversy, were it not that it throws light upon much in the history of those times that would otherwise be hard to understand. In this place it is enough to point out that in the pre-reform days the Whig leaders* held to this principle as an essential, though mysterious, doctrine of the Constitution, and that it has been abandoned as noiselessly as it was maintained. The contention that Parliament could not be dissolved during a session was at least plausible. Mr. Fox alleged that the Crown had no power of dissolution during a session. It was indeed true that no Parliament of Great Britain had ever been thus dissolved. The preceding Kings of the House of Hanover had never exercised such a power. For eighty years Parliaments had died a natural death. They had terminated either by effluxion of time or by the demise of the Crown. The last occasion on which a premature dissolution had taken place was the dispute of the two

* See on this subject Stapleton's *Canning and his Times*, 202; Massey's *History of George III.*, iii. 213; Todd's *Parliamentary Government*, i. 218.

Houses in the reign of Queen Anne about the Aylesbury men. Even on that occasion the Royal interference only anticipated by a very brief space the natural close of the Parliament's existence. The result, therefore, of this contest, the dissolution of the Parliament even before the Appropriation Act was passed, and the triumphant majority of Mr. Pitt in the new House of Commons, established beyond a doubt the right of the King to decline the advice of the existing House of Commons, and to send back its members to their respective constituents. But although the other subjects were then more largely discussed than at any subsequent occasion, it seems somewhat too much to say* that the precedent of 1784 was conclusive beyond the extent I have mentioned. It is indeed probable that if the elections had given a different result Mr. Pitt would not have retained his office. But no case of such a resignation occurred before 1835. In the autumn of the preceding year King William the Fourth summarily dismissed his ministers, and formed a new administration, of which Sir Robert Peel was the Chief. The new ministry did not meet the existing Parliament, but advised an immediate dissolution. It was not denied that in the former Parliament the ministry would have been in a considerable minority; and the dissolution must therefore be taken as if a hostile vote had actually been passed and an appeal therefrom made, according to the precedent of 1784, to the constituent bodies. But on the meeting of the new Parliament Sir Robert Peel found himself still in a minority, and after a gallant but unavailing struggle resigned. In describing these events an acute contemporary observer† notices with surprise the intensity of feeling which marked this contest. The bitterness of

* See Lord Russell's *Memorials of Fox*, ii. 246.

† See Mr. Greville's *Memoirs* (First Series), iii. 217.

public men appeared to him out of all proportion to the occasion. But the leaders of the Whig party knew that a vital principle of constitutional government was at stake. It was of little moment that a well-meaning, though not very wise, King had taken a dislike to his ministers. But it was essential that the personal feelings of the Sovereign should not disturb the course of public policy. The whole history of the Whig party had been a struggle to establish this doctrine; and they were not inclined, when their success was almost assured, to patiently acquiesce in a return to the practice of High Prerogative. Their righteous wrath had its reward. It is now definitely settled that the Royal Prerogatives are exercised in conformity with the advice of ministers; that no ministry can satisfactorily serve the Crown unless it also possess the confidence of Parliament; that if the King continue his confidence in his servants, although no such confidence be felt by the House of Commons, the proper mode of terminating the difference is by an immediate dissolution of that House; and that the ministry must abide by the results of the general election.

§ 2. "The power of dissolution," says Burke,* "is of all the trusts vested in His Majesty the most critical and delicate." "It is," says another eminent statesman,† "a great instrument in the hands of the Crown; and it would have a tendency to blunt the instrument if it were employed without grave necessity." The popular impression on this subject, however, is very different. It seems to be generally supposed that a defeated minister is entitled, if he think fit, at once to "appeal to the country." The concurrence of the Crown

Where a dissolution is proper.

* *Works*, iii. 525. † Sir Robert Peel's *Speeches*, iv. 710.

is assumed as a matter of course. But although ministers may advise a dissolution, the King is by no means bound to follow that advice. The refusal to grant the dissolution would indeed be a sufficient ground for the resignation of ministers; but, on the other hand, compliance with the request can only be meant to assist them against the hostility of Parliament. Such assistance the King cannot and ought not indiscriminately to give. The question therefore arises in what circumstances, according to modern constitutional usage, ought the prerogative of dissolving Parliament to be exercised.

"It is observed," says Lord Coke,* "by ancient Parliament men out of records that Parliaments have not succeeded well in five cases. First, when the King hath been in displeasure with his Lords or with his Commons. 2. When any of the great Lords were at variance between themselves. 3. When there was no good correspondence between the Lords and the Commons. 4. When there was no unity between the Commons themselves. 5. When there was no preparation for the Parliament before it began." If we omit the quarrels between the great Lords which belong to a social state different from that in which we live, and the want of preparation for the meeting of Parliament for which our present ministerial system provides a sufficient remedy, the above passage contains all the causes which have led or which can lead to a dissolution. Except where some organic change has been effected in the construction of Parliament, the only reason which can induce the King prematurely to dismiss his Great Council must be either that the advice that he obtains from it is unacceptable to him, or that he can obtain no definite and decided advice, or that the two portions of his

* 4 *Inst.*, 35.

Council are discordant. In other words, either there is a difference of opinion between the Crown and the House of Commons on the subject of some ministry; or the different parties in the Commons are so equally divided that business is obstructed; or the two Houses cannot on some material question come to an agreement.

I have already sufficiently indicated the course of proceeding when the King is unwilling to accept the advice of his Parliament. He can, if he think fit, seek for advice in a new House of Commons; and he ought to follow the advice which the new House tenders. But when the question arises, as in modern times it usually arises, upon the retention of a favoured minister and the dissolution of Parliament, the King is required to exercise a personal discretion of the gravest kind. Two bodies, each recognized by the Constitution as the advisers of the Crown, tender conflicting advice. The House of Commons desires the dismission of a ministry. The ministry advises the dissolution of the House of Commons. It is plain that where, as in 1835 and as in 1866, a dissolution has recently taken place, there is no reason for doubting that the representative body correctly represents the views of the constituent body. In such circumstances, therefore, a second dissolution is improper. Again, where no political question is at issue, but the object is merely the advantage of a particular party, there is no proper case for a dissolution. Even where the circumstances would otherwise warrant such advice, no minister should advise a dissolution unless he has a reasonable prospect of obtaining a majority in the new Parliament. On the other hand, when the House of Commons differs from the ministry upon a question of public policy, if the question be so pressing and so important that the ministry feels that if it accepted the views of the Commons it could not undertake the

responsibility of conducting public affairs, and if there appear to be from the ordinary indications of public opinion a strong probability that the views of the ministry are shared by the constituent body, and if the ministers still enjoy the Royal confidence, a dissolution is proper. Thus, in 1835, although rumours of a dissolution of the newly-elected Parliament were rife, and had assumed such a degree of consistency that the leader of the Opposition thought them deserving of being made the subject of Parliamentary interrogation, Sir Robert Peel never attempted to advise a second dissolution. So in 1846 the same statesman declared that, if the Corn Law Repeal Bill had been lost, he would certainly have advised Her Majesty to dissolve Parliament. But after the great question of commercial policy was settled, the minor and merely party question whether the existing ministry were or were not the proper persons to have introduced such a measure did not seem a fit issue to send to the country. Partly for this reason, partly because he was not satisfied with his prospects in the new elections, and partly because, after the recent excitement and the stagnation of trade consequent upon the revision of the tariff, the country required some repose, Sir Robert Peel tendered his resignation to Her Majesty, and did not ask for a dissolution.* When, therefore, the House of Commons has rejected any measure or disapproved of any policy which the ministry regards as essential to the public welfare, if there be reasonable grounds for supposing that the House does not truly express the views of the constituent body, and if the ministry have a "strong moral conviction that after dissolution they would be enabled to administer the affairs of the country through the support of a party sufficiently

* Sir Robert Peel's *Speeches*, iv. 710.

powerful to carry their measures," and if there be nothing in the state of the country to render a dissolution at that particular time prejudicial to the public interest, the ministers may reasonably ask for a dissolution; and if they retain the confidence of their Sovereign, their request will probably not be unsuccessful.

It sometimes happens that in reply to the request of the King for advice the House of Commons utters an uncertain sound. Sometimes, too, it is captious and hard to please, and is unwilling to give its confidence and support to any ministry that the Crown can form. The former of these difficulties was remarkably illustrated in 1831, when the great and at that time absorbing question of Parliamentary Reform was carried by a single vote. With a House so equally divided there was no reasonable prospect of successfully settling the question. Recourse was therefore had to a dissolution, and a decisive majority was obtained.

A frequent cause of dissolution has been the peculiar condition of the House of Commons. After the death of Sir Robert Peel that House was divided into several sections enlisted under separate leaders and following different guides. None of these sections was of itself able to undertake the Government, while their mutual differences and mutual jealousies prevented their combination in support of any administration.* But although they were thus incapable either of separately forming a ministry or of concurring in support of any ministry that may have otherwise been formed, their opposition to the existing administration always furnished a common ground of action. Though destitute of constructive power, they were abundantly powerful for the purposes of destruction. They could collectively thwart the measures and impede

* *Per* Earl of Derby, 3 *Hans.* cliii. 1269.

the business which any one of them might propose. This disjointed condition of the House was caused partly by the disruption of old political connections, partly by the settlement of those great questions for which men whose opinions were in other respects conflicting had agreed to co-operate, and partly by the unexampled prosperity of the nation and the absence of any pressing domestic grievance or foreign danger. But whatever may have been its cause, to this state of the House of Commons may be ascribed, whatever may have been their immediate and ostensible pretexts, the dissolutions of 1852 and 1857, and, if it admit of any justification, the dissolution of 1859.

The last of these events, indeed, is a conspicuous example of the violation of those principles which usually regulate the exercise of this prerogative. Its immediate cause was a vote of the House of Commons adverse to the Reform Bill which Lord Derby's ministry had introduced. But there was nothing in the state of the country at that time to render the rejected measure essential to the proper administration of public affairs. There was no such agitation as that which in 1832 had threatened civil war. Both before this bill and after it other Reform Bills were laid aside without any material disturbance of the public equanimity. The Parliament, too, was only in its second year, and nothing since its election had occurred to excite a suspicion that the existing House of Commons did not fairly represent the sense of the nation. The ministers declared* that they expected to have about three hundred supporters in the new Parliament. They could not therefore have felt "a strong moral conviction" that they would have a majority sufficient to enable them to carry on the Government. At the time of the dissolution the state of

* 3 *Hansard*, cliv. 160.

public affairs was very alarming. War between two great European powers was imminent. It was hardly possible to tell at what hour Her Majesty might require, on the subject of peace or war, the advice of her Parliament. So urgent, indeed, was the necessity, that, before the new Parliament could assemble, the Executive was obliged to incur the responsibility of increasing the naval force and of offering a bounty by Royal Proclamation without the advice of Parliament.* This dissolution, then, must be regarded as a mere party measure, and as such comes within the express condemnation of Sir Robert Peel.

Variances on administration.

§ 3. If, therefore, the King disapprove of the advice tendered to him by the House of Commons in respect to the exercise of any branch of the prerogative, whether in the appointment of his servants or in the performance of their duties, his proper course is to summon a new House and to be guided by its opinion. But the House of Lords has a right of advice co-extensive with that of the Commons; and to the House of Lords the remedy of a dissolution cannot be applied. It is necessary, therefore, to determine what course should be pursued when the Peers tender to their Sovereign advice which, after due consultation with his principal servants, he determines not to accept. The rule which the present practice of our political system seems in such cases to establish is that in all questions of administration the King ought to accept the advice of his Peers, unless a contrary opinion be distinctly expressed by the House of Commons: but that if such an opinion be expressed, it should prevail. When, therefore, a hostile vote has been passed against any ministry in the House of Lords, if the ministry do not

* 3 *Hansard*, cliv. 379.

resign, it ought to obtain from the House of Commons a vote of a directly opposite character. The principle on which this rule depends may be thus stated: A ministry requires for the efficient discharge of its duties the support of Parliament. Since Parliament consists of two parts, and since questions of administration do not, like questions of legislation, admit of compromise or delay, if there be a difference between these parts respecting the conduct of any ministry, some means of speedily deciding that difference must be found. Accordingly, the rule is that when the opinions of the two Houses are divided, the opinion of the House of Commons prevails. But as the existence of such a difference is not to be presumed, an adverse vote of the House of Lords must so weaken a ministry, both at home and in the estimation of foreign powers, that nothing but the unequivocal expression of the continued confidence of the House of Commons can restore it to its position.*

It is remarkable how seldom an avowed difference on the conduct of the Executive Government has arisen between the two Houses. Two instances, neither of them much in point, have in the course of debate† been cited from the reign of Queen Anne. The first of these cases was an unjust attempt of the House of Commons to interfere with the right of the Peers to inquire into certain dangerous plots alleged to exist between persons in Scotland and the Courts of France and St. Germains. The other case was the disregard shown by the Executive to a resolution of the House of Lords in the year 1710, declaring certain terms which that House deemed essential to an honourable peace. This resolution however was, as it were, directory only. It related to a matter still incomplete; and it

* 3 *Hans.*, xlvii. 12, cxii. 239. † See 3 *Hans.*, cxii. 545.

was quite possible that a peace which in 1710 seemed objectionable might two years afterwards have become very desirable. But no instance, so far as I am aware, occurs in any unreformed Parliament of a censure by the Peers upon a completed act of administration or upon a course of administrative policy which was supported by the Commons. Since the Reform Act there have been several cases which support the doctrines that I have above stated.

In 1833 there was a civil war in Portugal between Don Pedro and his brother Don Miguel. A considerable military force was raised in England in behalf of Don Pedro, and proceeded to his assistance. The Duke of Wellington moved in the House of Lords an address to the King, praying that His Majesty would give such directions as were necessary to enforce the observance by his subjects of His Majesty's declared neutrality in the Portuguese contest. Lord Grey, who was then Prime Minister, accepted this motion as a censure upon the Government for a neglect of their public duty. On a division there was a majority of twelve against ministers. On the following day, in reply to a question in the House of Commons, the ministers declared their intention, notwithstanding this vote, to adhere to their former policy; and a motion was immediately submitted by one of their supporters to the Commons, expressing grateful acknowledgment of the judicious policy which His Majesty had pursued with reference to the affairs of Portugal. This motion was carried by a great majority, and Lord Grey's ministry was undisturbed.

The next case occurred in 1839. The House of Lords resolved to appoint a committee to inquire into the Marquis of Normanby's administration as Lord Lieutenant of Ireland. From the circumstances in which this vote was passed, the ministers considered it as equivalent to

a direct censure upon their Irish policy. On the day following the debate in the House of Lords, Lord John Russell, the then leader of the Government in the House of Commons, announced his intention to take on an early day the opinion of the House as to the Irish administration; and intimated that upon the result of that discussion the existence of the ministry must depend. He accordingly moved a resolution approving in strong terms the principles which guided the Executive Government of Ireland, and declaring the expedience of an adhesion to them. It was contended by the Opposition that the vote of the House of Lords was not such as to warrant this resolution. But it does not seem to have been denied that, if the hostility of the Peers had been more directly expressed, the course adopted by the Government would have been proper. Lord John Russell's resolution was carried by a majority of twenty-two; and the ministry were thus enabled to disregard both the vote of the Lords for the inquiry, and a scarcely less hostile vote by which some months afterwards the Report of the Committee was followed.

In the year 1850 serious differences with Foreign Powers arose in consequence of certain claims by two British subjects against the Government of Greece, which claims the English Government enforced by blockade and other violent measures. The House of Lords, upon the motion of the Earl of Derby, adopted a resolution which both affirmed a general principle of international law and conveyed a censure upon the Government for their conduct in the affairs of Greece. Lord John Russell,* who was then Prime Minister, refused to accept the resignation of Lord Palmerston, then Foreign Secretary; and announced that

* See *Ann. Reg.*, 1850, p. 72; Alison's *Hist. of Europe*, viii. 820.

the Government dissented from the general rule of the law of nations thus laid down by the House of Lords, and refused to conduct itself according to that rule, and that it would adhere to its former policy. But although he offered facilities for a motion on the subject, the Premier did not himself seek the interference of the House of Commons. A motion strongly approving of the principles which regulated the foreign policy of Her Majesty's Government was moved by Mr. Roebuck, by no means an habitual supporter of the ministry, and was carried by a majority of forty-six. This victory effectually secured for a time the ministry, whose existence had previously been very precarious.

The point in the last case which for our present purpose deserves notice is that Lord John Russell refused himself to propose in the House of Commons any counter resolution to that of the House of Lords, and did not cause any such motion to be made by his supporters. He sought to throw the burden of further proceedings on the Opposition. He seemed strangely to forget the precedent which he himself had established in 1839; and it is remarkable that, although the precedents of 1710 and of 1833 were freely cited, no speaker in the debate of 1850 before Mr. Disraeli, who closed the debate, referred to that great discussion which was so directly in point, which was so recent, which had continued for five whole nights, and which had at the time warmly excited public interest. But Lord John Russell distinctly admitted the importance of the resolution of the House of Lords, and showed that it affected the conduct of Foreign Powers in relation to the Government of England. Mr. Roebuck, who moved the counter resolution, and several speakers in the course of the debate, urged the necessity of either maintaining the harmony, or at least of defining the disagreement, between the Houses; and

pointed out that the Opposition, who were quite satisfied with the vote of the House of Lords, had no occasion to interfere with that vote.

In 1839 a small sum was granted by Parliament for national education, and a committee of the Privy Council, consisting exclusively of members of the Government, was appointed to administer it. The House of Lords presented an address to Her Majesty requesting that she would give directions that no steps should be taken with regard to the establishment of any plan for the general education of the people of the country without giving their House an opportunity of considering the subject. This motion involved no direct censure on the Government, and no notice was taken of it in the House of Commons. Her Majesty made a gracious reply, and explained that as the money had been granted some means for its administration had become necessary, and that nothing had been done which could give any reasonable cause of complaint. The matter then dropped. In 1864 a concerted attack was made in both Houses upon the foreign policy of the ministry in relation to the Prussian war with Denmark. This attack was successful in the Lords and was unsuccessful in the Commons. The two divisions took place on the same night, and any further declaration was superfluous.

In 1871 a more serious case occurred. The Crown had power (whether statutory or by prerogative) to abolish the system of purchasing commissions in the army. The existing practice was probably in certain respects illegal, but it had continued without dispute for many years. The Government elected to proceed by legislation, and a bill abolishing purchase was passed by the House of Commons. The House of Lords passed a resolution declining to read the bill a second time until they had before them a

comprehensive scheme. Thereupon a Royal warrant was immediately issued abolishing the system. The Lords agreed to a vote of censure upon the ministry, and passed the bill under protest in the interests of the officers whose claim to compensation was involved. No counter motion was proposed in the Commons, presumably because the issue of the Royal warrant was intended to give effect to a principle which the House had already, by passing the bill, affirmed; but the conduct of the ministry was sharply criticised by many even of their own supporters.

To me the precedent of 1871 seems a warning rather than a guide. There was no dispute upon any matter, whether legislative or administrative, between the two Houses. A grave affront was offered by the Crown to the House of Lords, which that House naturally resented, but with which the House of Commons was not required to interfere. There was nothing to prevent, in the first instance, the exercise of the Crown's legal powers. But by seeking the advice of Parliament the Crown in effect waived its right. Parliament will not entertain any question affecting the prerogative until the Crown desires its opinion. But when that opinion has been asked, a promise seems to be implied that recourse will not be had to the prerogative as long as the question is under consideration. The sudden exercise of a right after such a waiver was an act for which I cannot recall any precedent. Such a waiver is, of course, not eternal; but it may reasonably be assumed to last during the current session. The course which the ministry pursued in 1871 can at best be regarded as a mere party movement, and one which had no tendency to do honour to the Crown or to promote the harmony of the legislature.

It seems, therefore, to me that the precedent of 1839 is binding. A hostile resolution of the House of Lords is not indeed sufficient to produce a change of ministry; but

it is sufficient to render necessary the distinct expression of an opposite opinion from the House of Commons. It is a ground not for resignation but for appeal. But it is an event which requires some kind of action. It raises a presumption against ministers, which if it continue is fatal, but which they, if they can, may rebut. The burthen of disproof rests in such circumstances with them; and there is no need for their opponents to initiate in the House of Commons any further proceedings. It was said by Lord John Russell himself that if ministers were condemned by one portion of the Legislature, and the matter were left unexplained, uninquired into, with no questions asked and no opinion expressed, to foreign nations they would not appear a Government. In these circumstances a ministry ought not to affect to ignore the censure of the House of Lords, or to wait either for any further attack or for the casual interference of some independent member to elicit the opinion of the House of Commons. In the words of Mr. Roebuck,* "Any administration which is thus censured by the House of Lords is bound not to shrink from an appeal to the House of Commons; and if that appeal, when made, is not successful, then their path is clear."

§ 4. The two Houses of Parliament may differ not only in the exercise of their function of controlling the Executive, but also in the exercise of their function of legislation. In each of these two cases there is a distinct remedy. If the House of Lords reject any bill submitted to them, the King's Government, which had been carried on previous to the introduction of that bill, can still be carried on after its loss. But if the House of Lords disapprove of any administrative proceeding, the

Variances in legislation.

* *Ann. Reg.* 1850, p. 74.

business of administration is at once impeded. It is in this case that the need for some power equivalent to a dissolution is felt. If the House of Commons were to censure the existing administration, the King would have the power of testing the extent to which the nation agreed with the opinion of its representatives. But since the House of Lords cannot be altered by a dissolution, it would, unless some other check were provided, have the power of obstructing the Executive with absolute impunity. In these circumstances the remedy which the Constitution provides is that which I have already endeavoured to explain. It permits the censure of the House of Lords to be overruled by the express approval of the House of Commons; and thus enables the question, if the case should so require, to be by means of a dissolution ultimately submitted to the decision of the constituent bodies. But where a difference exists between the two Houses on a measure of legislation, that difference may possibly continue for years without peril or inconvenience; and the Constitution therefore provides no summary method of reconcilement. It trusts to the good sense and moderation of both parties. Full discretion is given to each House, and the Constitution assumes that the exercise of that discretion will be sound and well regulated. If any measure be an object of strong public feeling, and be passed by successive Houses of Commons and by large majorities, the Lords, however distasteful to them the measure may be, will generally give way. If the Lords be determined in their resistance, the Commons are seldom unwilling to moderate their demands. The healing influence of the Crown is always present to soften any asperity. The still more potent force of public opinion restrains within reasonable limits the ardour of the Reformer and the inactivity of the Conservative.

Our whole Parliamentary history since the Reform Act abounds with illustrations of these principles. No greater error was ever made in political prophecy than the prediction in 1832 of the virtual annihilation of the House of Lords by the events of that year. The true position of the House of Lords was no more weakened by the acceptance of the Reform Bill in the time of William IV. under the pressure of the prerogative, than it was weakened by the acceptance of the Irish Forfeitures Bill in the time of William III. under the more degrading pressure of a tack. The influence of the Peers in legislation was speedily felt in the reformed Parliament. Lord Melbourne's Administration came into office on the express vote of the House of Commons that the appropriation to educational purposes of the surplus revenues of the Irish Church was essential to the settlement of the question of Irish tithes. Yet the Lords compelled the settlement of the tithe question without the aid of these principles thus deemed to be essential. They succeeded in carrying the amendments* which they desired in the English Municipal Reform Bill. For four successive years they virtually rejected the bills for the reform of Irish corporations; and at length the Commons were obliged to accept amendments quite inconsistent with the principles of legislation which they had asserted. The Irish Electoral Act, although after a less severe struggle, experienced a similar fate. Still more remarkable was the contest respecting the admission of the Jews to Parliament. Seven times successively the Commons sent to the Lords a bill enabling Jews to sit in Parliament, and seven times the Lords rejected the proposal. On the question of church rates a still greater number of attempts at legislation failed than in the case of the Jews. Ultimately in

* May, *Const. Hist.*, i. 264.

both cases a compromise was arranged; and these long-standing and irritating disputes were brought to a successful conclusion.

§ 5. There is, however, another method by which it is said that a refractory House of Lords may be brought to reason. When that House persists in its opposition to any important measure, a sufficient number of Peers may be created to secure a majority for the favoured project. For some time this method of solution has been usually recognized as the proper mode of dealing with the problem. It has become a sort of tradition among what is called the Liberal party. The "swamping of the Peers" is a process of which the thoughtless and the ignorant speak and write with great complacency. Wiser men regard it as a very dangerous but very useful instrument. No one, however, now seems to dispute the existence of the power. Sir T. E. May* asserts that "a creation of Peers by the Crown on extraordinary occasions is the only equivalent which the Constitution has provided for the change and renovation of the House of Commons by a dissolution;" and, after observing that this power should be used only in cases of "grave and perilous necessity," he adds that such a measure, "should the emergency be such as to demand it, cannot be pronounced unconstitutional." I may, perhaps, appear to many persons to support an idle paradox, and to deny a fundamental principle of our Constitution; but even with this risk I venture entirely to dissent from Sir Thomas May's proposition. So far from thinking that the sudden creation of Peers for a special emergency is the only equivalent in the House of Lords for a dissolution—or,

Creation of Peers to carry a bill.

* *Const. Hist.*, i. 262.

in other words, that it is the only legitimate means of securing harmony between the different parts of our Government—I think that our Constitution does not afford this assumed means for obtaining the desired object, and that it does afford different means.

In discussing this question it must be observed that the material point is the object with which the Peers are created, and not their number or the simultaneity of their creation. Mr. Pitt created a very large number of Peers. Sometimes these creations were in batches; sometimes they were separate. Other ministers have followed his example. Sometimes ten, sometimes sixteen, peerages, sometimes even a greater number, have been conferred at the same time. Although important political consequences have followed from these creations, and although it may have been thought that there was occasionally an improvident exercise of the prerogative, no person ever questioned their legality or considered them as dangerous to the independence of the House of Lords. But that exercise of the prerogative which is reserved for "cases of grave and perilous necessity" is obviously a very different thing. It is one thing to extend the influence of the Crown and to strengthen the general position of a ministry; and it is quite another thing, when one branch of the Legislature has pronounced its deliberate opinion, wilfully to falsify that opinion. The objections to the creation of the twelve Peers to vote for the Peace of Utrecht by the advice of Lord Oxford and Lord Bolingbroke rested upon grounds entirely distinct from the objections, if any had been taken, to the creation or promotion of three times that number under the advice of Mr. Pitt within the years 1795 and 1796.

There are, so far as I am aware, three occasions only in our history on which the creation of Peers, for the purpose

of securing a majority in the House of Lords on a specific question, was seriously contemplated. The first was the proposed repeal of the Test Act in 1688 by James the Second; the second was the Peace of Utrecht in 1711; the third was the Reform Bill of 1832. As to the first of these cases* little needs be said. The proclamation for the Parliament in which it was intended to propose the repeal of the obnoxious Act† was revoked a few days after it had been issued, and James the Second and his Parliament never again met. But if the King had carried out his project, if before the Revolution the Peers had been created and the Test Act repealed, it is not unreasonable to suppose that this exercise of the prerogative would have found its place in the black catalogue of Royal enormities contained in the Declaration of Rights; and that its abolition would have been one of the glories of Whigism, just as its revival has in our own days been so regarded.

In the session of Parliament held in December, 1711, Queen Anne announced that arrangements were made for the negotiation of a Treaty of Peace. In the House of Lords an amendment to the Address was carried, representing to Her Majesty the opinion and advice of their Lordships that no peace could be safe or honourable to Great Britain or Europe if Spain and the West Indies were allotted to any branch of the House of Bourbon. Some days afterwards their Lordships passed other resolutions on the same subject, which were hostile to the policy of the Government, and adjourned for the Christmas recess to an unusual day—the second of January. On the last day of the year twelve Peers were created; and no secret was made of the intention, if it were required, to double the number. Subsequently Her Majesty communicated to

* Hallam, *Const. Hist.*, iii. 73.
Macaulay, *Hist. of Eng.*, ii. 314.

both Houses the terms of the proposed treaty, which were not in accordance with the previous advice of the Lords. Both Houses approved of the terms ; and the treaty was in due course concluded accordingly. But on the accession of George the First, the leaders of the Tory party, the Duke of Ormond Lord Bolingbroke and the Earl of Oxford, were impeached. The two former noblemen escaped to France ; Lord Oxford awaited his trial. One of the charges* against him was, that he, " contrary to his duty and his oath, and in violation of the great trust reposed in him, and with the immediate purpose to render ineffectual the many earnest representations of Her Majesty's allies against the said negotiations of peace, as well as to prevent the good effects of the said advice of the House of Lords, and in order to obtain such further resolutions of that House of Parliament on the important subject of the said negotiations of peace as might shelter and promote his secret and unwarrantable proceedings, together with other false and evil councillors, did advise Her Majesty to make and create twelve Peers of this realm and Lords of Parliament. . . . By which desperate advice he did not only as far as in him lay deprive Her Majesty of the continuance of those seasonable and wholesome counsels in that critical juncture, but wickedly perverted the true and only end of that great and useful prerogative to the dishonour of the Crown and the irreparable mischief to the constitution of Parliaments." To this Article Lord Oxford answered " that grants of peerage are the spontaneous acts of the Royal bounty, without any advice from the Privy Council or reports from the Attorney-General or other officers ; that from the usual mode of making such grants he, either as Lord Treasurer or Privy Councillor, could

* 15 *State Trials*, 1083.

have no knowledge of them; but that if Her Majesty had asked his opinion whether the persons she intended to create were suitable persons, he should have highly approved of Her Majesty's choice; that they were all persons of honour and distinguished merit; that as several of them were the eldest sons of Peers the number of the peerage would not be much increased; and that on former occasions the prerogative had been exercised in a manner not less extensive."* Owing to a dispute between the two Houses respecting the conduct of the trial, the Commons refused to appear; and the impeachment was therefore dismissed. But although a question was raised in the House of Lords whether the facts stated in certain of the Articles which charged Lord Oxford with treason amounted to that crime, it does not appear that any similar question was raised respecting the Article from which I have quoted. It is obvious, too, that the Earl's answer, except so far as it denied that he gave advice, was irrelevant. The charge was not that improper persons were appointed; or that the peerage was unduly increased; or that the simultaneous creation of so large a number was objectionable. The offence alleged was that the Earl wilfully advised a measure which deprived Her Majesty of a continuance of the wholesome advice of the House of Lords, and that he induced Her Majesty to exercise her prerogative in a manner tending to injure the constitution of Parliaments. The case does not warrant us in saying that such advice, if it were given, would amount to a high crime and misdemeanour. All that it establishes is that the House of Commons voted the charges to be such; and that the House of Lords did not express any dissent from that opinion, and was prepared to try them accordingly.

* For the simultaneous creation of ten peerages a few years before, see *Luttrel's Diary*, vi. 113.

In 1832, during the great conflict respecting Parliamentary Reform, when the danger of civil war was imminent, and when every attempt to form a new administration had failed, King William the Fourth reluctantly consented to the creation of a sufficient number of Peers to secure a majority in favour of the Reform Bill. Owing, as I have already remarked, to the private exercise of His Majesty's personal influence and to the discretion of some of the Conservative leaders, the bill passed without the necessity for recourse to any unusual measure. But Lord Brougham has since declared his belief that if the secession of the Conservatives had not taken place, and the bill had been rejected or materially altered, neither he nor Earl Grey, the two persons to whom the Royal authority was given, would have ventured to avail themselves of that authority. "Such," he says,* "was my deep sense of the dreadful consequences of the act that I much question whether I should not have preferred running the risk of confusion that attended the loss of the bill as it then stood rather than expose the Constitution to so imminent a hazard of subversion. Had we taken this course, I feel quite assured of the patriotism that would have helped us from the most distinguished of our political antagonists, and I have a firm belief that a large measure of reform would have been obtained by compromise."

It thus appears that the original conception of this use of the prerogative belongs to what is now universally acknowledged to be the worst period of our Constitutional History; that on the only occasion on which the design was actually carried into effect, although its execution was on a small scale and was perhaps not without some

* *British Constitution*, 270.

extenuating circumstances,* the minister who advised or was supposed to have advised it had to answer before his Peers for a criminal violation of his duty; and that in modern times, when the expedient has been revived, the very persons who obtained the Royal consent for this purpose declare that they would have faced any risk rather than have had recourse to a measure so full of peril. This constitutional equivalent for a dissolution therefore does not derive much support from precedents. Still less can it be justified on general principles. It is the function of the House of Lords to advise the Crown in all affairs of state. It is in times of grave and perilous necessity that the "wholesome counsels" of the Peers are most needed. Yet it is in these very times that, according to its supporters, this extraordinary creation of Peers may be made. If the Crown could in this way silence or pervert the House of Lords, it would remove at the very moment when the restraint was required one of the checks which the Constitution has provided against the rash or improvident action of the Crown or of the Commons. The King would no longer act by the advice and with the consent of the Lords, but with his own advice and his own consent, or at least with an advice and consent which the law deems for the purpose insufficient. And this irresponsible action would be all the more dangerous because it retained the pretence of responsibility. In short, if it be wrong to pack a House of Commons, it cannot be right to swamp a House of Lords.

* "I asked Lord Oxford afterwards what was the real inducement for taking so odious a course when there were less shocking means to have acquired the same end. He said the Scotch Lords were grown so extravagant in their demands that it was high time to let them see they were not so much wanted as they imagined; for they were now come to expect a reward for every vote they gave."—Lord Dartmouth's Note in Burnet's *Hist. of His Own Times*, vi. 94.

It is probable that the general belief in this supposed constitutional remedy has to some extent arisen from a failure to perceive the true remedies which the Constitution has provided for any disagreement between the Peers and the other authorities of the state. These remedies I have already endeavoured to indicate. Where the two Houses are at variance respecting the advice they should offer to the King, the Constitution affords, according to the nature of the case, a twofold solution of the difficulty. Where the subject of difference is the practical administration of existing laws and requires an immediate decision, the remedy is the preference given to the advice of the Commons. Where the subject of difference is a novelty and consists of some proposed alteration of the law, the remedy is fuller consideration, and, if need be, compromise. But in no case does our Constitution recognize the deliberate stifling of one part of the Legislature or the perversion of its utterances. We may indeed draw a lesson from the events of 1832 ; but it is a warning against the obstinacy that yields too late, and the recklessness of agitation which verges upon treason.* Perhaps not the least injury which that rash excitement has caused is the habit which it has generated of thinking and speaking lightly of organic changes and of desperate remedies. The free use of such political stimulants is ill suited to sobriety of political thought and action. At the best it converts the medicine of the Constitution into its daily food. But the evil is still worse when the stimulant proves to be not really medicinal, but in all cases unsuited to the system and merely deleterious.

§ 6. There have sometimes arisen between the two Houses disputes of what perhaps may be termed a personal

* See Roebuck's *History of the Whig Ministry*, ii. 311.

character. Some matter of privilege, or some fancied want of due respect, has often given rise to very bitter animosities. The good sense and moderation which are characteristic of Englishmen, and the salutary control of public opinion, have usually been sufficient to prevent any serious results from such misunderstanding. But there have been occasions on which some more active influence was required. This influence is found in the interposition of the Crown. When the dissensions of the two Houses have reached such a height as to interrupt the progress of public business, the excitement has generally been allayed by a prorogation. In the great contest during the reign of Charles the Second respecting the civil jurisdiction of the House of Lords, and subsequently in the angry discussions that arose out of the impeachment of Lord Danby, this remedy was advantageously applied. After the Revolution a similar course was adopted on the dispute concerning the trial of Lord Somers, and again in the still more violent dispute respecting the Aylesbury men.

Variances as to privileges.

There have also been cases in which the King, although he is not supposed to take any official notice of anything that occurs in Parliament until a formal communication is made to him, has, either officially or in an informal manner, interposed between the disputants his personal good offices. In 1669, in the great dispute concerning judicature to which I have referred, the King prorogued the Parliament, although no bill had been passed, and he consequently lost a supply of four hundred thousand pounds which the Commons had voted. But when the prorogation had expired, notwithstanding the anxious warnings of the Royal speech against a renewal of these hostilities, the House of Commons lost no time in reviving the subject. The King then offered his mediation between the Houses;

and proposed that all records and entries of this matter, whether in the Council books and Exchequer or in the journals of both the Houses, should be erased; and that proposal was gladly accepted.* In the year 1700 a dangerous dispute arose between the Houses in consequence of the Commons having tacked to a bill of supply the bill for the resumption of Irish forfeited estates, a measure to which the gravest objections existed. In these circumstances William the Third,† although he did not actively interfere, allowed it to be understood that he considered the passing of the bill as on the whole the less of two great evils. The effect of this intimation was that many Lords abstained from voting, and the bill was passed. A still more memorable case occurred in connection with the passing of the Reform Bill in 1832. On that occasion, when both Houses seemed equally determined, and when there appeared no alternative between some terrible outbreak and the simultaneous creation of eighty Peers who were favourable to the bill, King William the Fourth induced the most violent opponents of the bill not to push matters to an extremity; and caused his private secretary to write a circular letter to the opposition Peers announcing in effect that the secession of a sufficient number of Peers to ensure the passage of the bill had been arranged.‡

Sir T. E. May§ expresses his opinion that in this case the interference of the King with a bill still pending was more unconstitutional than the proposed creation of Peers would have been. Such a proposition sounds somewhat like a *reductio ad absurdum* of Sir Thomas May's views. I have sufficiently stated my reasons for dissenting from both

* Sir M. Hale's *Jurisdiction of the House of Lords*, 123.
† Macaulay's *Hist. of Eng.*, v. 281.
‡ Roebuck's *Hist. of the Whig Ministry*, ii. 334.
§ *Const. Hist.*, i. 120.

the doctrines thus expressed. I have attempted to show that such a creation of Peers is not only unconstitutional but is absolutely unlawful, and that in certain cases the other course has weighty precedents in its favour. But since the interference of the Crown is certainly unusual, we may inquire what are the conditions which determine the propriety or the impropriety of the Royal interference with matters still before Parliament. I think* that the cases establish the following points. In the first place, the object of the interference should be to reconcile the two Houses, not to create a difference between them. Secondly, this interposition relates to the Lords rather than to the Commons. Thirdly, the remedy ought not to be applied until all others have failed, and consequently the occasions for its use are rare. In cases of dispute between the two Houses respecting their privileges the Crown cannot be supposed to have, and in fact never has had, any motive for interference other than the desire to restore their friendly relations. It is only in matters of legislation that any difficulty arises. It must always be the interest of the King that the action of the other powers of the state should be harmonious. To secure this harmony the Royal opinions and feelings are frequently and freely sacrificed. We might thus expect the result which the cases suggest. The King may induce one House to sanction a bill which the other House has passed ; but he ought not to induce

* The first volume of the late Mr. Todd's work on *Parliamentary Government* and the first edition of the present work were published in the same year. Mr. Todd's second volume, which appeared some years afterwards, contains (p. 205), in reference to the King's conduct in 1832, the following footnote :— "A fuller examination of this case, in the light of the recently published correspondence of Earl Grey with King William IV., has led me to modify the opinion expressed in my first volume on this subject, when I followed Mr. May in condemning the interference of the King. I am now disposed to agree with Mr. Hearn in thinking the conduct of the King, under the circumstances, to have been justifiable."

either House to reject a proposal of the other. Conciliation, not strife, is the gracious mission of the Crown.

We can thus see the distinction between the conduct of William the Fourth on the Reform Bill, and that of his father on the India Bill of 1783. King William interposed to allay a difference which threatened either the peace or the Constitution of the country. Nor did he act until every other lawful expedient had been tried without success. But the course pursued by George the Third, notwithstanding the opinion of Lord Campbell in its favour,* was not the proper remedy for the occasion. He might have changed his ministers, or dissolved Parliament, or rejected the bill. But instead of taking any of these courses, he exerted his personal influence with the Peers to procure the rejection of this bill which his ministers, with his concurrence, had proposed, and which the House of Commons had passed. It is scarcely worthy of a King to shrink from the exercise of his own lawful power of rejection, and secretly to excite others to engage in the quarrel which he himself dared not provoke.

It appears, also, that the Royal interference is directed to the Peers and not to the Commons. The reason why, in fact, the precedents have hitherto pointed in this direction is because the movement for change has always originated with the Commons, and the resistance of the Lords to that change was the force to be overcome. But the principle of the rule is found in the different authority of the Crown over the two bodies. The King can dissolve the House of Commons, but he has neither that nor any similar power in the case of the Peers. There is no need, therefore, for any effort to influence the Commons, because in that case a different and more efficient remedy is provided. But the

* *Lives of the Chancellors*, v. 560.

Crown has no direct means other than that of conference by which it can communicate its wishes to the Peers or influence their proceedings. Yet events have often showed the need for such communications. Thus the power of conference is given when it is needed, and is not found where a substitute exists. The effect of such an interference depends in a great degree upon the discretion with which it is employed. The political knot, like the dramatic knot, should be worthy of the power that unloosens it. Sometimes other remedies are sufficient to meet the case: sometimes the difficulty may not be so grave as to require any interposition. But if, unhappily, other expedients fail, and if the exercise of Government be impeded, it seems to be both reasonable and consonant with usage that the King should take notice of the obstruction to the public business, and should use all his influence to remove it.

§ 7. Mr. Gladstone,* writing of the British Constitution, observes that "it presumes more boldly than any other the good sense and good faith of those who work it. If, unhappily, those personages meet together on the great arena of a nation's fortunes, as jockeys meet upon a racecourse, each to urge to the utmost, as against the others, the power of the animal he rides; or, as a counsel in a court, each to procure the victory of his client without respect to any other interest or right; then this boasted Constitution of ours is neither more nor less than a heap of absurdities. The undoubted competency of each reaches even to the paralysis or destruction of the rest. The House of Commons is entitled to refuse every shilling of the supplies. That House, and also the House

Good faith in the exercise of Constitutional powers.

* *Gleanings*, i. 245.

of Lords, is entitled to refuse its assent to every bill presented to it. The Crown is entitled to make a thousand Peers to-day, and as many to-morrow. It may dissolve all and every Parliament before it proceeds to business; may pardon the most atrocious crimes; may declare war against all the world; may conclude treaties involving unlimited responsibilities, and even vast expenditure, without the consent, nay, without the knowledge of Parliament; and this not merely in support, or in development, but in reversal of policy already known to and sanctioned by the nation. But the assumption is that the depositaries of power will all respect one another; will evince the consciousness that they are working in the common interest for a common end; that they will be possessed, together with not less than an average intelligence, of not less than an average sense of equity and of the public interest and rights. When these reasonable expectations fail, then it must be admitted the British Constitution will be in danger." These views are not likely to be disputed in the abstract. It is in their practical application that difficulties may be expected. I propose, therefore, briefly to notice some cases in which an adherence to these principles has been beneficial, or a departure from them hurtful.

Where the two Houses differ on a question of legislation, in which case alone, as we have seen, a deadlock is possible, the pressure usually comes from the Commons. In such circumstances the House of Lords ought not to be obstinate. If, after full opportunity for consideration, the deliberate opinion, not merely of the existing House of Commons, but of the country, be in favour of a particular measure, the Peers are accustomed to follow the example which the Crown sets in the appointment of its ministers, and acquiesce, however reluctantly, in legislation which they do not approve. They are not under any legal obligation

to do so, but in the exercise of a wise discretion they are content with securing full and mature consideration of the plan. A people is truly free when it is governed by persuasion, and not by command. In our free Constitution, then, if all arguments have failed, the permanent governing bodies—that is, the Crown and the Lords—feel that they have performed their duty, and cease to oppose when they are unable to persuade. This practice, however, prevails only in the case of ministerial questions. Bills have often been passed during many successive years, and by different Parliaments, and yet the resistance of the Lords has not been overcome. But such bills have been introduced by private members. Where a change of ministry and a dissolution consequent thereon have taken place, or where the Opposition have in effect declined to accept this test, the practice of the Constitution is now settled. Some compromise is usually made, but in any case the disputed bill becomes law.

The weakest part of this system is in its connection with the privileges of the Commons regarding finance. The Commons claim—and, practically, their claim is not now disputed—an exclusive authority over money bills. They have sometimes been tempted to use this exclusive power as a means of coercing the other branches of the Legislature ; that is, they have included in the same bill grants of money and provisions on some dissimilar subject. In such circumstances the Lords or the Crown, as the case may be, are placed under the hard necessity of refusing to make the needful provision for the public service or of accepting a measure to which they honestly object. In the reigns of William the Third and of Anne, this "most reprehensible device," as Hallam* calls it, was used with

* *Const. Hist.*, iii. 141.

success. But it has long been settled that tacking, as it is called, is "unparliamentary, and tends to the destruction of the Constitution."

The troubles that some years ago arose in Victoria were mainly due to the circumstance that in dealing with money bills the Constitution Act of the colony converted into positive law what in England is merely a rule of parliamentary practice. The result was that the exclusive claim of the House of Commons became an exclusive right of the Legislative Assembly. It cannot be said that the House of Lords would break any law if it were to alter an Appropriation Bill; but the Legislative Council is in express terms forbidden to make any such alteration; consequently the temptation to use the tack is much stronger in Victoria than it is in England. Yet, in the one country as in the other, after the question was understood, the right judgment of the people has prevailed, and it is not probable that the controversy of 1865 will be renewed.

There is a cognate question of greater difficulty. May the Lower House include, in an Appropriation Bill, a grant of money for a purpose to which the other House has expressed its dislike? Such an inclusion is not a tack, because the grant is not foreign to the purposes of the bill. Further, the case of the Paper Duties Bill, to which I shall in a subsequent chapter more fully refer, does not apply; for this is a matter of expenditure, and that related to revenue. The leading authority in the Imperial Parliament on the present subject is the case* of Mr. Palmer. This gentleman, who was the author of important postal reforms, had a disputed claim against the Post-office. The controversy lasted many years; and, in its course, a bill providing for a certain portion of the claim was passed by the

* See Todd's *Parl. Govt.*, i. 438.

Commons and rejected by the Lords. Subsequently, a motion relating to a different portion of the claim was carried in the House of Commons, and resulted in the introduction for Mr. Palmer's benefit of a considerable sum into the Appropriation Bill; but when it was shown that the Lords had expressed an opinion that Mr. Palmer's claim was unfounded, the grant was withdrawn from the Appropriation Bill, and was placed in a separate measure, with the avowed purpose "of affording to the Lords an opportunity of considering that grant distinctly from the other grants of the year." Other questions arose, and other proceedings were taken in the matter; but, although they have still an interest, they are not necessary for my immediate purpose. Except the Paper Duties Bill, which relates to a different branch of the subject, I know of no other English precedent directly in point. But the whole matter was discussed at great length, and with dangerous heat, in Victoria. A Governor of the colony,* Sir Charles Darling, had for certain reasons been recalled. The Legislative Assembly proposed to grant to him, or failing him to his wife, a large sum; and the amount was accordingly included, without any previous communication with the other House, in the Appropriation Bill. The Legislative Council objected to the grant, because it was contrary to the rules of the Colonial Office, and tended to public corruption, and rewarded a Governor for conduct which had led to his removal. They could not amend the bill; and, as their only remaining course, laid it aside. The other House was not less resolute, and refused to place the Darling Grant in a separate bill. A violent and protracted contest arose. At length the Secretary of State, in a

* See Todd's *Parl. Govt. in the British Colonies*, 112–116.

despatch to the Governor, expressed his regret that the Legislative Assembly should have thought it advisable to include in the Appropriation Bill a grant exceptional in its character, and notoriously obnoxious to a majority of the Upper House. He intimated the opinion of Her Majesty's Government that the Queen's representative ought not to be made the instrument of enabling one branch of the legislature to coerce the other; and, therefore, that the Governor ought not to recommend the grant to Lady Darling, unless on the clear understanding that it would be brought before the Legislative Council in a manner which would enable them to exercise their discretion respecting it without the necessity of throwing the colony into confusion. Ultimately an arrangement was made by the Colonial Office with Sir Charles Darling in pursuance of which he declined for himself and his wife any grant from the colony.

From these authorities it appears that the question is one in which we must distinguish. If the grant be an ordinary financial matter, the Upper House, whatever its opinion may be on the merits, ought not to interfere. That House is not responsible for the prudence of the annual expenditure. It retains, indeed, a latent power which may in case of need be exercised. But, in the absence of any great emergency—and it is with such a state of facts alone that we are now concerned—the action of the Upper House would be inconvenient, and therefore their power should not be used; and, therefore, no blame can be imputed to them for the expenditure. But where the purpose of the grant is unusual, and is not within the ordinary expenditure of the year, it becomes a matter not of mere finance but of policy. In these circumstances the Upper House is entitled to claim that a forbearance which in ordinary cases they are willing to exercise shall not be

expected, and that no coercion shall be employed to deprive them of their right of free judgment. It has never been contended* that the Lords may not deal with questions of legislative policy even though these questions involve matters of revenue. On the like principle they ought to be free to discuss any matter of public policy, even though that policy involves the spending of money. The wisdom of enforcing, on any particular occasion, this right at so great a cost depends, of course, upon the circumstances of each case. But the loss of an Appropriation Bill is conclusive evidence of wrong somewhere, whether that wrong be aggression or obstinacy, or both. Opinions will always differ as to whether a given state of facts does or does not justify the rejection of an Appropriation Bill. But the distribution of the blame which such a rejection implies must be determined by that arbiter, which, as Hallam† observes, "has been the great preservative of the equilibrium in our Government—the public voice of a reflecting people, averse to manifest innovation, and soon offended by the intemperance of factions."

* May's *Const. Hist. of Eng.*, i. 476.
† *Const. Hist.*, iii. 141.

CHAPTER VIII.

THE CABINET.

§ 1. I have said that under our present system the powers of the Crown are exercised by the agency and under the advice of certain officers of state, and that the conduct of these officers is criticised in Parliament. But apart from their relations either to the Crown or to Parliament, a remarkable relation has grown up between those officers themselves, which forms the very corner-stone of our modern system of Government. Few writers have, until very recently, cared to treat of this subject, and still fewer have fully discussed it.* Our present familiarity with its working is easily mistaken for a knowledge of its theory; and the system, the gradual and undesigned and sometimes interrupted growth of many years, does not readily admit of a clear and unembarrassed description. It is not, therefore, without hesitation that I attempt to trace in the present chapter the rise and progress of the Cabinet.

Description of modern administration.

The Cabinet of the present day may be described as a Political Committee of the Privy Council.† As the judicial functions of that ancient board are now exercised by a committee specially organized for the purpose; and as

* See, for much valuable information on this subject, Earl Grey's *Parliamentary Government*, and Mr. Cox's *Inst. of the Eng. Govt.*, b. i. c. x.

† See *The Grenville Papers*, ii. 515, iii. 15, and *Hans.*, vi. 300; Macqueen's *Appellate Jurisdiction.*

other committees have been in like manner formed from it for the exercise of other parts of the prerogative, so the general direction of all public departments and the decision upon all important questions of administration are now vested in a similar committee. There is indeed a difference, although not a very material one, between the Cabinet and the other committees to which I have referred. The latter have a known right and a statutable jurisdiction. The growth of the Cabinet has been spontaneous, and its powers and duties are fixed by custom. This committee is nominated, like all other parts of our Executive system, by the Crown, and comprises the chief officers of all the great departments of state. These officers are members of either House of Parliament; and their opinions on the pressing questions of the time agree generally with the opinion of Parliament, or at least of the House of Commons. When this agreement ceases, they make way for others who can fulfil this essential condition. In accordance with the advice of this body, however it be for the time constituted, the King, while he retains their services, always acts. This advice, at least on all important occasions, is the result of joint deliberation, is communicated to the King in a joint form or through their Chief, and is taken to be the advice of the collective body. Each member of the ministry, therefore, is responsible for all the proceedings of the ministry; and in like manner the collective ministry is bound by the acts of each of its members. If any minister is overruled on a point on which he feels that he cannot submit to the opinion of the majority, he must resign. If the ministry feel that it is compromised by the misconduct of a colleague, that colleague must be immediately removed. "It is," says Lord Macaulay,* "by means of ministries thus

* *Hist. of Eng.*, iv. 436.

constituted and thus changed that the English Government has long been conducted in general conformity with the deliberate sense of the House of Commons, and yet has been wonderfully free from the vices which are characteristic of Governments which are administered by large, tumultuous, and divided assemblies. A few distinguished persons agreeing in their general opinions are the confidential advisers at once of the Sovereign and of the Estates of the realm. In the closet they speak with the authority of men who stand high in the estimation of the representatives of the people. In Parliament they speak with the authority of men versed in great affairs and acquainted with all the secrets of the state. Thus the Cabinet has something of the popular character of the representative body, and the representative body has something of the gravity of a Cabinet."

§ 2. In the earlier period of our history all administrative business was transacted in the Privy Council. This body, which at different times is mentioned by various names, is that Council assigned by the law to the King for affairs of state. In it all questions of public policy were debated, and the Royal resolutions concerning them were adopted. But there was no concerted action between its members, and no pre-arranged policy. There was no disposition on the part either of individual members or of the whole body to cease to offer any further advice if they found that their advice was disregarded. Their duty was to advise the King. If he adopted their counsel, it was well. If he disregarded it, they could only in their respective offices carry out his views as well as the nature of the case admitted. If they gave improper advice, or if they, in submission to the Royal directions, transgressed the limits of the law, they were criminally liable. But it

Description of administration before Restoration.

was the duty of each councillor merely to give his advice; and it was the duty of each minister to execute within the limits of his office all lawful commands that the King might issue. There was therefore no unity of sentiment among members of the Council. They were indeed employed in the service of a common master; but in private, and even in public, they made little attempt to conceal their differences, and were frequently engaged in mutual and deadly hostility.* When they were in Parliament they were indeed expected to procure the desired subsidies with as much expedition as they could; but any attacks upon each other, and occasionally even votes against favourite projects of the Crown, were regarded as, at the worst, venial offences. If a servant were in other respects meritorious, the King did not think of dismissing him because he opposed in Parliament what he had previously opposed in Council. On some occasions the authority of the Crown was vigorously exerted, but these displays of vigour were exceptional. The strict discipline of later times was characteristic of a very different system. In many respects, indeed, the relation that then subsisted between the Crown and its advisers was in reality what it professed to be in words, the relation of master and servant. The official counsellor, such as Cecil or Hyde, often deplored, like some faithful steward, the extravagance of his master, and grieved at the infatuation that rejected all advice and was deaf to every entreaty. But he would have thought himself grossly failing in his duty if on that account he deserted his post; and his dismission pained him, not as a mere pecuniary loss, but as a slur upon his fidelity.†

* See Macaulay's *Hist. of Eng.*, iii. 13.

† Lister's *Life of Clarendon*, ii. 516. See also Hallam's *Const. Hist.*, i. 256.

§ 3. Although some traces of the practice are found in the times of Charles the First,* the first separation of the Political Committee from the Privy Council dates from the Restoration. At all times indeed the King must have frequently transacted business with some small number of his more trusted councillors; and Clarendon speaks of the formation of committees of "dexterous men" from the Council table for the despatch of business. About the time of Charles the First the rank of Privy Councillor seems to have been gradually becoming a mark of honorary distinction; and the increase of such councillors would of course diminish the utility of the council as an administrative body. At the Restoration it was thought expedient to retain the surviving members of Charles the First's Privy Council. These persons, together with the ministers of the restored King, amounted to thirty. Some of these former counsellors had sided with the Parliament, and were thus of suspected loyalty.† Such a body so composed seemed to the practical and zealous Hyde to be certainly inefficient, and probably unsafe. He accordingly procured, perhaps as part of a general scheme of administrative reform, the appointment of a committee of six persons whose ostensible duty was the consideration of foreign affairs, but who really deliberated in the presence of the King upon all questions of importance, whether domestic or foreign, before they were submitted to the Council Board. It was probably to this same committee—it certainly was to one of which Clarendon was a member—that the King entrusted the general management of his parliamentary business. On Clarendon's fall the practice was continued; and an accident gave to it a curious prominence. The initial letters of the

Separation of Cabinet from Privy Council.

* See Cox's *Institutions of the English Government*, 240.

† Lister's *Life of Clarendon*, ii. 6, 7.

names of its then members happened to form the word "Cabal," a word previously merely equivalent to cabinet, but ever since doomed to bear an odious connotation.

The deliberations of the King with a portion only of his Council had long been a matter of some jealousy. Such a favoured body was called from the Spanish practice a junto, and from French and Italian analogies a cabinet or cabal. Lord Bacon,* after noticing the inconveniences which they are designed to cure, describes cabinet councils as a remedy worse than the disease. Metis the wife is degraded into Metis the mistress. The Councils of State to which princes are married degenerate into councils of "favoured persons recommended chiefly by flattery and affection." The Cabinet of the Stuarts was indeed equivalent to "the King's friends" of the House of Hanover. The return, therefore, to the good old ways of dealing with the Privy Council only was a favourite project of Administrative Reform. In 1679, Sir William Temple organized an elaborate but short-lived Privy Council. Its chief recommendation was its recognition of the principle that the King was in all respects to follow his Council's advice. Its principal defect was its inability to prevail upon him to do so. At length in the Act of Settlement a provision was introduced requiring that after the Hanoverian Succession all business properly cognizable in the Privy Council should be transacted there, and that all resolutions taken thereupon should be signed by the Privy Councillors who advised them. Before it came into force this clause, which merely revived an ancient practice,† was repealed. No

* Bacon's *Works*, vi. 425.

† "In the reign of Henry V. every act of the Council, of which there are many still extant, was written on a separate paper and signed by all the members present, except the officers. These documents were afterwards copied into the General Register or Book of the Council."—*Proceedings of Privy Council*, ii. 26.

explanation of the reasons of the repeal are recorded. It may perhaps have been that, as Mr. Hallam suggests, ministers shrunk from so definite a responsibility. But we know that the Tory party, who did not venture openly to oppose the measure, used every method to discredit it;* and that they accordingly loaded the bill with clauses to which they thought that the Lords would not agree, and on the loss of which they hoped to raise disputes sufficient to procure its rejection. The Lords perceived the design, and passed the bill without amendment. At a later period, when the Whigs were in power, this clause and some others which were personally offensive to the future King were repealed. It may then be inferred that the restoration of the former mode of transacting business was felt to be inconvenient: and a sort of implied sanction seems to have been given to the new method, partly by the postponement of the clauses in the Act of Settlement during the existing and the succeeding reigns, and partly by the deliberate repeal of these provisions. Soon after this repeal, in the beginning of the year 1711, we find in an address of the House of Lords to the Queen a distinct recognition of the Cabinet Council;† and on the same occasion there arose a curious discussion respecting the meaning of the terms Cabinet and Ministers.

It is said‡ that the House of Commons has never in any of its authentic acts recognized the existence of the Cabinet. But usage has now effectually settled the position of that body. It either exercises or directs the exercise of all the powers of the Privy Council. In some matters the minister of the department alone takes the

* Lord Cowper's *Impartial History of Parties*; see Lord Campbell's *Lives of the Chancellors*, iv. 421.

† 6 *Parl. Hist.*, 970.

‡ Per Sir G. C. Lewis, 3 *Hans.*, clv. 79; see Todd's *Parl. Govt.*, ii. 141.

Royal pleasure. In other matters which are of a more formal nature, or which relate more directly to public affairs, the King in Council has to deal. But the chief of each department is a member of the Cabinet and acts with the sanction, express or implied, of his colleagues; and thus the proceedings of the several departments are under the direction of the Cabinet. No members of the Privy Council attend the meetings of that body unless their presence is specially requested; and it is under the advice of the Cabinet that such summonses are issued. The Privy Council of the present day is thus in effect the Cabinet, meeting in the presence of the Queen for the purpose of informing Her Majesty of the result of their previous deliberations on certain classes of public subjects, and of receiving Her Majesty's pleasure upon the advice that they thus tender. The dignity, therefore, of a Privy Councillor is now merely titular. It confers a certain rank and position, but does not necessarily bring with it any political influence.

Cabinet selected from Parliamentary majority.

§ 4. Lord Macaulay* observes that the first English ministry was gradually formed, and that its precise date must therefore be uncertain. But the period from which he is inclined to reckon the era of ministers is the meeting of Parliament after the general election of 1695. I venture to think that this date marks a very early stage in ministerial development. Still it is in this point of view a remarkable period. William the Third had commenced his reign with the desire to retain in his service the ablest men of every shade of political opinion. Administrative ability and not political sympathies formed, in his judgment, the proper qualification

* *Hist. of Eng.*, v. 124.

for office. He, himself the ablest statesman of his day, took a leading part, as his predecessors had done, in the business of administration. He commanded his own army. He conducted his own negotiations, and decided upon his own foreign policy. But in the House of Commons party spirit was still bitter ; and although their opponents were a formidable minority, the Whigs were in the ascendant. One after another, successful attacks were made upon those parts of the Government which were administered by Tories. The naval administration* was censured ; and the change which ensued necessitated the further change of removing Lord Nottingham, the great Tory leader, from the office of Secretary of State. Shortly afterwards the Duke of Leeds,† the Lord President, was for the second time in his eventful life impeached ; and although the Commons did not continue their proceedings, and he was allowed nominally to retain his office, he virtually ceased to be a minister. Trevor, who had been first Commissioner of the Great Seal, had previously given way to the able legal champion of the Whigs, Lord Somers ; and, about the time when the Duke of Leeds was impeached, was obliged, as Speaker of the House of Commons, to put to the vote and announce the adoption of the resolution that branded himself with corruption.‡ Lastly, although not for some time afterwards, Godolphin, the sole remaining Tory amongst the great officers of state, was induced to tender his resignation.§ The general election of 1695 had been highly favourable to the Whig party : their chiefs were intimately connected with each other, and were devotedly supported by their followers.‖ Thus the junto, as they were called, possessing the confidence both of the King and of Parliament, formed, at least so far as domestic

* Macaulay, iv. 469, 470. † *Ib.*, 561. ‡ *Ib.*, 550.
§ *Ib.*, 734. ‖ *Ib.*, 446.

affairs were concerned, a veritable though undeveloped ministry.

Thus, at the commencement of the eighteenth century two principles may be regarded as almost, if not thoroughly, established. The unwieldy machinery of the Privy Council was superseded by a smaller and more efficient executive; and this new body was composed of men whose opinions on political subjects were alike, and were also acceptable to Parliament. But the mode in which the ministry is changed in accordance with the fluctuations of opinions and feelings in the House of Commons was not then known. The statesmen of the Revolution were not conscious of the great political change which was proceeding among them. Not even Lord Somers, "the foremost man of his age in civil wisdom," thought it strange that one party should be in possession of the executive administration while the other predominated in the Legislature.* Still, although the process of change was both tedious and painful, its principle became gradually fixed. In the later years of William and the early years of Anne, both the action of Parliament and the condition of the administration were highly unsatisfactory. At length the disposition of the nation and the partialities of the Crown happened for some time to coincide. The people were gratified with the successful prosecution of the war. The Queen was anxious to promote the glory of the husband of Mrs. Freeman. But Mrs. Morley and Mrs. Freeman quarrelled; the latter was discharged, and the Tory waiting-woman was installed in her place. About the same time came the great storm of Sacheverell, and the cry that the Church was in danger. The Whig Government failed to resist the combined influence of Court

* Macaulay, v. 168.

intrigue and popular bigotry ; and, although not all at once, a Tory administration was formed. On the death of Queen Anne a reaction took place in favour of Whig principles ; and the new King, from the very nature of his position, selected Whig statesmen as his advisers. These changes, however, were for the most part dependent upon court favour. When the credit of an unwelcome minister declined in Parliament, the opportunity was usually taken to dispense with his services. It was not until the fall of Sir Robert Walpole that a minister, strong in official experience and in the implicit confidence of the King, first acknowledged that he could no longer usefully serve the Crown when he no longer possessed the confidence of the House of Commons. Even then, the subordination of the executive to the Legislature long remained incomplete. The ministry had not yet acquired its political unity ; and in the absence of such unity the process of change was tedious and difficult.

§ 5. I have said that under our older system of Government the affairs of state were discussed by the Privy Council in the presence of and in conjunction with the King. Even at the present day when a Privy Council is held Her Majesty is personally present ; and the proceedings at such meetings are the acts not of the Privy Council but of the Queen in Council. When that separation of the Political Committee of the Privy Council to which I have referred took place after the Restoration, the King continued his personal attendance at the committee. In the succeeding reigns the same practice was observed ; but during the frequent absence of William the Third, his servants were compelled to meet without him for the discussion of state affairs. It is hardly possible that the principal servants of the Crown, or at

Cabinet Councils held without King.

least such of them as were intimately connected, should not at all times have held private deliberations upon the state of public affairs and their parliamentary and political prospects. But an organized and permanent system of political consultations seems to have commenced under the Tory ministry of Queen Anne. Dean Swift records that it was Mr. Harley's custom every Saturday to have at dinner a small party of his political associates. The persons who were usually present on these occasions were the Lord Keeper Harcourt, Earl Rivers, the Earl of Peterborough, St. John, and Dean Swift.* At these meetings (the Dean relates) "after dinner they used to discourse and settle matters of great importance." But on the accession of the House of Hanover these precedents of occasional absence of the King and of private consultations of the ministers acquired a new importance.† The King did not know English, and his ministers did not know German. George the First neither understood nor cared to understand the domestic affairs of his new kingdom; and was only anxious to escape from it as often and for as long a time as he safely could. His son, although he was somewhat less ignorant of our language and our circumstances, was almost equally attached to his continental dominions, and was conscious of his inability to form any independent opinion upon British affairs. The King consequently ceased to preside at Cabinet meetings; and received the advice of his ministers either separately, according to their respective departments, or collectively through one of the leading members of the Cabinet. The usage of forty-five years, and the obvious convenience to ministers of the arrangement, and the circumstance that

* See Lord Campbell's *Chancellors*, iv. 466.

† See Hallam's *Const. Hist.*, iii. 290; Buckle's *Hist. of Civiliz.*, i. 402, *note*; Lord Waldegrave's *Memoirs*, 66.

these Cabinet meetings were unofficial and unrecognized by law, and perhaps a belief on the part of the King that he would attain his object by other means, seem to have caused the practice to remain unchanged when George the Third ascended the throne.

It is not easy to understand the precise character of the Cabinet Council a century ago. Although such a body is frequently mentioned at an earlier period, its powers must have been very different from those which it now possesses. Sir Robert Walpole was in effect,* as he was often described, sole minister. Lord Waldegrave† speaks of the Duke of Newcastle as sole minister. Yet Cabinets certainly existed under each of these statesmen; but no such expression could be applied to a minister of the present day. From the manner in which a contemporary politician‡ writes of the convention of a Special Council to which every member was summoned, and at which His Majesty announced his intended marriage, it seems that the distinction of the two bodies, the one for deliberative purposes and the other for the formal statement and adoption of advice, was fully known in the commencement of the reign of George the Third.§ More than forty years afterwards Mr. Fox referred to it as the usual and well-known mode of conducting business. On several occasions, too, in the earlier part of the reign references are made to appointments to the Cabinet Council. One of these is very curious. It relates to the year 1761. "The Duke [of Leeds] is forced to quit the Cofferer's place, but to break his fall is made a Cabinet Councillor, a rank that will soon become indistinct from Privy Councillor

* See Lord Campbell's *Chancellors*, iv. 630.

† *Memoirs*, 20. ‡ *Grenville Papers*, i. 374.

§ Respecting the number of the Cabinet, and the grades of power in it in 1782, see Bentham's *Works*, ix. 218, *note*.

‖ 6 *Hansard*, 312. ¶ *Bedford Correspondence*, iii. 49, 134, 210.

by growing as numerous."* It is said, too, that Lord Bute's appointment to the Cabinet, and not to the Privy Council, was much censured at the time.† On the Address in 1761, Lord Temple moved, as an amendment, a request for the appointment of a first minister,‡ a motion which, although unsuccessful, suggests a very different state of things from that which now exists. Under the administration of George Grenville§ the want of proper communication between the ministers seems to have been felt, and an attempt was made to supply the deficiency by regular Cabinet dinners. Again, in the negotiations between Mr. Fox and Lord North, which resulted in their coalition,‖ the departmental character of the Government, not only during but before Lord North's administration, and the want of concert between the servants of the Crown were brought into notice.

This method of government by departments was exactly that which George the Third laboured to establish, and was sharply opposed to the method of government by a Cabinet. In the latter method the independent preliminary consultation is essential. It tends not only to effect that political unity to which I shall presently refer, and to compose in private those dissensions between the servants of the Crown which formerly were manifested openly, but also to bring the Royal will directly under the influence of ministers. A decided course of action, complete in all its details, is now recommended to the King. He has merely to assent to it or reject it. If he choose the latter alternative, his ministry resigns, and he has the serious task of forming another administration which is likely to coincide in his views. Thus in 1825, when the recognition of the

* Walpole's *Letters*, iii. 384.
† Walpole's *Memoirs*, i. 8, *note*.
‡ *Ib.*, 459.
§ *Grenville Papers*, ii. 256.
‖ Fox's *Memorials*, ii. 38.

Spanish colonies was under consideration, George the Fourth, who was very averse to this measure, required from his Cabinet, upon a question which he proposed to them, "an individual *(seriatim)* opinion." The ministers, however, declined to give such an opinion, but after consultation sent a joint reply defending their policy. The King had thus no option except to dismiss all or none, and he accordingly acquiesced in their proposals.* The effect of this change in executive affairs is analogous to the change in legislation that marks the reign of Henry the Sixth. The Parliament presents its bill, as the ministry tenders its advice, in matured and suitable form. In matters of state therefore, as in matters of legislation, the voice of the King is no longer deliberative, but sanctioning. The act is still his act, and he may either accept or decline the advice which his council for legislation or his council for affairs of state tenders; but if he decline, he cannot expect to continue on friendly terms with the council in which he thus plainly intimates his distrust.

§ 6. We have thus traced several steps in the history of Cabinets. They began by the separation from the Privy Council of a kind of committee for administrative purposes. The next step was that this committee was selected from the political party at the time predominant in Parliament. In the third place its deliberations were conducted apart from the King, and its advice was tendered to him in a definite form. But the distinctive characteristic of the Cabinet, and the feature which is essential to its successful and complete operation, is its political unity. The Cabinet is not an ordinary board. It is literally a partnership of

Corporate character of the Cabinet.

* Stapleton's *Canning and His Times*, 418, 435.

Privy Councillors for administering the government. If it fail or if it succeed, its failure or its success is that of the collective body. Whatever internal difficulties it may have, its voice and its action are single. If one of its members commit any error or become involved in any difficulty, the blame attaches not to him only, but to all those who either actually concurred in his views or at least authorized him to act in their behalf. It is needless to say that under our existing system a retiring ministry gives way at once and in a body to its successor. Except in the case of a mere reconstruction of a ministry, no member of the outgoing ministry is now asked or would consent to remain in office under the opponents of his party.

This principle is of very recent growth. When the Tories came into office in 1710 the displacement of a few of the great officers of state was spread over a period of four months; and Burnet denounces as wholly unparalleled so sudden and so complete a change. In 1742, on the fall of Sir Robert Walpole, Mr. Pulteney, who demanded, but with little practical success, a change of measures as well as of men,* complained of his inability† to do more than make a very partial alteration in the administration. When negotiations were opened with the elder Pitt in 1763 he declares that he and his friends must "come in as a party;"‡ and insisted upon removing all those who had supported the peace, the acceptance of which was the cause of his resignation, and upon supplying their places with members of the Opposition.§ But these demands were regarded as so extraordinary and so violent that, although the urgency was great, the negotiations were broken off. In 1765, when the first Rockingham ministry was formed, the extensive

* *Bedford Corres.*, i. 12.
† Earl Stanhope's *Hist. of Eng.*, iii. 110.
‡ *Grenville Papers*, ii. 198.
§ *Ib.*, 105.

nature of the changes then effected was regarded as something quite unprecedented. "I do not remember in my times," writes Lord Chesterfield,* "to have seen so much at once as an entire new Board of Treasury and two new Secretaries of State *cum multis aliis*." To such expressions of contemporary statesmen must be added the significant silence of political writers. Neither Blackstone nor De Lolme, who professedly treated of our institutions, in any way notice the system of Cabinets. Except Edmund Burke, none of the historians or other public writers who, up to his time, incidentally discussed our institutions, perceived the change that was in course of accomplishment. What is perhaps the most remarkable of all, the principle seems to have been altogether unknown in America at the time of the Revolution. Neither in the writings of Hamilton or of Jefferson, nor in the debates upon the organization of their new Government, can we discover any indication that the statesmen who framed the constitution of the United States had the least acquaintance with that form of Parliamentary government which now prevails in England.

I think that the second Rockingham ministry—that of 1782—was the first of the modern ministries. It arose from the hostility of the House of Commons to the previous administration. It involved an almost complete and simultaneous change of the Royal servants. It was founded on the distinct understanding† that measures were to be changed as well as men, and that the measures for which the new ministry required the Royal consent were the measures which they, while in opposition, had advocated. It was a decisive victory over the personal inclinations of the King. During twelve years George the Third had actually conducted the administration in accordance with

* *Letters*, iv. 401. † Massey's *Hist. of Eng.*, iii. 79.

his own views, but with lamentable results ; and now, in his anger at his defeat and at the hard necessity of altering his policy and submitting himself to the direction of new and less compliant servants, he is said to have seriously contemplated a retreat to Hanover. Yet even this ministry had little cohesion. It retained as its Chancellor Lord Thurlow, who remained in office at the express desire of the King, and steadily opposed in the House of Lords all the measures of his colleagues. But short-lived as it actually was, and destined from its constitution to no lengthened existence, it was the nearest approach to a ministry that the country had yet seen. Thirty years afterwards we find a remarkable advance upon the views as to changes both of measures and of men. In 1812 Lords Grey and Grenville declined to enter upon negotiations for a comprehensive administration. It was proposed to form a coalition ministry in which the Whig party should have a majority of one. The offer was declined* on the ground that to construct a Cabinet on a system of counteraction was inconsistent with the prosecution of any uniform and beneficial course of policy. In the same year other negotiations with the same Lords were broken off on the refusal of the Regent to extend the proposed political changes to his household. These principles have, with scarcely any exception, been since that time carried steadily into effect. The executive government is carried on not by unconnected departments, but under the general superintendence of a supreme board. That board has a *quasi* corporate existence. Each part is sensitive to the success or the failure of every other part ; and the whole includes within its vitality the political existence of each member.

* Stapleton's *Canning and His Times*, 201.

§ 7. It is a consequence of this corporate character of the ministry that the opinion of the majority should bind the minority. The ministry is one body, and can have but one voice. On questions with which the ministry as such does not undertake to deal, unanimity is needless. But on every ministerial question, on every matter relating to the executive government, and on every bill which the Government considers important for the business of administration, all members of the Government must act as one man. This rule is obviously incidental to the formation of a perfect Cabinet. It applies to a ministry and not to ministers. It is therefore of recent origin. In former times the servants of the Crown made no secret of their likings and their aversions. Even since the Restoration there are abundant instances of their conflicts.* Sir Thomas Coventry, a Lord of the Treasury, was the principal accuser of Lord Chancellor Clarendon. The Lord Treasurer Danby found his most bitter enemy in Winnington, the Solicitor-General. Partly from his own energy and partly from his favour at Court, Walpole was able to maintain a rigorous discipline; but his rigid rule was quickly relaxed in the feeble grasp of his successors. When Sir Thomas Robinson led the House of Commons in 1756, his principal opponents were the Paymaster of the Forces and the Secretary at War. The elder Fox, when Secretary at War, was the most violent opponent of his colleague Lord Hardwicke's Marriage Act.† The elder Pitt threatened with impeachment the Duke of Newcastle and the officers of the Treasury if anything were wanting for the war.‡ Under George the Third, the King's friends always voted against an unwelcome ministry. The King was prompt to deal

Majority prevails in Cabinet.

* Macaulay's *Hist. of Eng.*, iii. 13. † Earl Stanhope's *Hist.*, iv. 28.
‡ Walpole's *Memoirs of George III.*, i. 80.

with any insubordination when his own views were opposed, but was deaf to every suggestion of enforcing discipline in favour of ministers whom he disliked.

Although the rules which require for the administration the support not only of its own members but of all subordinate political officers were understood and enforced by Sir Robert Walpole, his own predominance was too marked to admit of any difference existing between the members of his Cabinet. The first occasion on which the alternative of submission to the majority or resignation was distinctly brought into view occurred in the contest shortly after Walpole's retirement between the Pelhams and Lord Carteret, afterwards Earl Granville. The former were strong in political connections; the latter relied upon his unbounded influence with the King. The differences between these ministers were not only personal, but political. On the question of foreign policy and of peace and war there were serious disagreements.* Lord Carteret at length declared to the Pelhams that things could not go on as they were; that he would not submit to be overruled and outvoted on every point by four to one; that if they would, they might take the Government; but that if they did not, there must be some direction, and he would do it. At length, after much negotiation, the Parliamentary influence prevailed. The forces which the Pelhams mustered were overwhelming; and the King, under the advice of his old minister, now Lord Orford, but sorely against his will, gave his decision in favour of the majority of the Cabinet, and accepted Lord Carteret's resignation.

The next case that bears on this subject is the resignation of the elder Pitt and the close of his splendid administration. On the accession of George the Third new counsels

* 1 *Bedford Correspondence*, iii. 11.

prevailed, and Lord Bute was in the ascendant. The introduction into the Cabinet of a new Secretary of State and of a new Chancellor of the Exchequer, without reference to the opinions of the existing members, does not appear to have occasioned any remonstrance. But on the great question of peace or war Mr. Pitt was left with a solitary supporter in the council. The great commoner declared* that he would not be responsible for measures which he could not control. He accordingly tendered his resignation to the King, and stated that he was obliged to take that step from his differences in opinion from all the rest of the Cabinet, and that he thought his remaining in office would only create difficulties and altercations in His Majesty's councils. The King expressed his sorrow at parting with Mr. Pitt; but observed that, on the point in question, he agreed so much with the majority of the council that, although he would have yielded to their opinion if they had supported Mr. Pitt, it would have been with difficulty that he could bring himself to do so. Mr. Pitt's resignation was, therefore, accepted; and he at the same time received, in recognition of his distinguished services, various marks of Royal favour.

The principle upon which his father had thus acted was, some thirty years afterwards, vigorously carried out by the younger Pitt. I have already mentioned that Lord Thurlow, while Lord Chancellor in the second Rockingham administration, had been practically the leader of the Opposition in the House of Lords. He continued the same practice when Mr. Pitt was Prime Minister. But he miscalculated both his own influence and that of his chief. For some time the perversities of the wayward Chancellor were unnoticed, or attracted at most a good-humoured

* *Bedford Correspondence*, iii. 48.

remonstrance. At length Lord Thurlow opposed in the House of Lords an important portion of Mr. Pitt's financial policy, the bill for establishing the Sinking Fund. The Premier's patience had reached its limits. The next day he wrote to the King, stating that either Lord Thurlow or he must retire from His Majesty's service. The King did not hesitate ; and, much to his surprise and vexation, the Great Seal was withdrawn from the refractory Chancellor. At the present time the principle is well established, and is constantly observed in practice. When a difference exists upon any subject of ministerial policy between any minister and his colleagues, if no compromise can be effected, and if the dissentient minister wish to avoid the responsibility of the course sanctioned by the majority of the Cabinet, he must resign. If he remain in office, he cannot complain that he is included in any censure attaching to acts of which he privately disapproved, but which by his presence in the Cabinet he continued publicly to sanction.

Cabinet responsible for each member.

§ 8. It is a further consequence of this corporate character of the Cabinet that the responsibility which attaches to the acts of any one member extends to the whole body. As the individual member by his silence in public ratifies and adopts the measures which although against his wish have been adopted by the whole Cabinet, so the collective Cabinet is responsible for the official acts of its separate members. Each minister is, as it were, the agent of his partners for the execution of his particular duties. In the political partnership as well as in the commercial partnership, and in each case on the same principles, the act of the partner binds the firm. The first occasion on which this collective responsibility was brought into notice was the attack made by Mr. Fox in 1779 upon Lord Sandwich's administration

of the Admiralty. On that occasion Lord North caused it to be understood that the vote of censure, if it were carried, would be taken to affect the whole administration. But Lord North's administration can scarcely be called a ministry, as we now understand the term. It was, as he himself admitted, a mere collection of departments under the personal control of the King. This precedent, therefore, if it stood alone, would not be entitled to much weight. But in 1838 a vote of censure upon the colonial administration of Lord Glenelg was proposed; and the Government insisted* that it should be considered as extending to the whole ministry. This case was afterwards noticed by Sir Robert Peel† as establishing the principle that the act of one part of the Government is shared by all. Accordingly on a recent occasion when a personal attack was made upon Lord John Russell for his conduct in relation to the negotiations at Vienna, in 1856, Lord Palmerston declared that the ministry were prepared, if Lord John Russell had not insisted upon resigning, to support their colleague and to abide by the decision of the House of Commons upon his conduct. There are indeed cases in which an adverse vote in Parliament may induce or may compel the resignation of an individual minister. Parliament may refuse to sanction a policy which one of the ministry considers essential, but on which his colleagues, although they may have acquiesced in his views, do not entertain equally strong opinions. Thus in 1791 Mr. Pitt contemplated a war with Russia in consequence of the occupation by that power of the fortress of Oczakow, which commanded the road to Constantinople. The proposition was strongly opposed in Parliament, and received little support in the country. At length the ministry,‡ finding

* 3 *Hans.*, xli. 476. † *Speeches*, iii. 607.
‡ Massey's *Hist. of Eng.*, iii. 442.

that their policy was not understood, and that there was no probability of their obtaining the support which an enterprise of such magnitude required, abandoned the project. The Duke of Leeds, who was then Secretary of State for Foreign Affairs, did not choose to alter a policy which his department had recommended, and resigned; but no further ministerial changes took place. There have been several similar instances of a later date; but they have all arisen either from a reluctance on the part of the retiring ministers to acquiesce in some decision of Parliament which their colleagues had accepted, as when a portion of Lord Palmerston's first ministry retired because they objected to the inquiry into the Crimean war that was instituted by the House of Commons, or from some want of cordial support from their own party, as in case of Lord John Russell to which I have already referred and of Lord Ellenborough in 1858.

But if a minister of the Crown were to commit in his particular department of Government any act of gross neglect or malversation,* or any act for which he was singly responsible, Parliament might reasonably ask for the removal of such a minister from the Royal councils without any hostility to the ministry of which he was a member. Such was the case of Viscount Melville. Mr. Pitt, grieved though he was, and vigorously as he had defended his friend, did not think that the condemnatory vote upon Lord Melville required or was intended by the supporters of that vote to require the resignation of his ministry. In 1809 the second Earl of Chatham,† who was also Master-General of the Ordnance with a seat in the Cabinet, was sent in command of that disastrous expedition to the Scheldt, which still renders hateful to

* Sir Robert Peel's *Speeches*, iii. 908.

† Sir G. C. Lewis's *Administrations of Great Britain*, 321.

British ears the name of Walcheren. On his return Lord Chatham delivered to His Majesty personally a confidential narrative of this expedition. For this direct presentation of a public document to His Majesty with a request of secrecy and without the intervention of a Secretary of State, the House of Commons passed a vote of censure on Lord Chatham. Lord Chatham immediately resigned his office ; but his colleagues did not retire, and their resignation does not seem to have been expected. Some days afterwards, indeed, they succeeded in defeating a general vote of censure upon the conduct of the expedition. They were responsible for the general policy of the enterprise and for the conduct of the officer whose appointment they had or were supposed to have advised ; and the fact that the commanding officer was also one of their own body drew the ties of responsibility still closer. But for his irregular mode of communicating with the King that colleague was alone responsible. So, too, in 1864, the House of Commons expressed its disapproval of certain irregularities of Lord Chancellor Westbury. The matters to which this censure applied were not political, but related to the personal conduct of the Lord Chancellor in the administration of his office. The result was that the Lord Chancellor resigned ; but no further change then took place in the ministry of which he was a member.

The principles which govern these cases are sufficiently apparent. In the former class the retiring ministers disagreed with the majority of their colleagues. They had previously concurred in the propriety of a certain course. When Parliament disapproved of their policy, a new element was introduced. The one portion wished to adhere to their former views. The other portion was content to accept the views indicated by Parliament. In these circumstances the minority retired, just as they

would have retired upon any other subject of disagreement. In the other class of cases there is either no agency at all or the agent has acted outside his proper powers. The responsibility for the acts of partners relates to their lawful acts only, and cannot be extended to their offences. But it is not unreasonable that in ordinary matters of policy the conduct of each minister should bind his colleagues. For the ordinary details of the business of each department the other ministers rely upon the discretion of its chief. They have deliberately associated themselves with him; and if they doubted his competence they could have declined his alliance. In most cases* when men agree generally in the ends which they wish to obtain, they will also agree, at least in a general way, in the means by which those ends should be accomplished. They will also be ready in matters of detail to make large concessions for the sake of carrying on the government. Each minister therefore acts in his own department as the recognized agent of his colleagues in that particular department, subject, however, to inquiry and control by the whole body. But in all cases on which any difficulty is likely to arise, each minister, from motives not merely of prudence but of honour, takes the opinion of the Cabinet. When this precaution is taken, the measure becomes of course the common act of the ministry. All its members have either expressly approved of it, or have at least sanctioned it by their acquiescence. On no question, therefore, of general policy can one minister be dealt with apart from his colleagues. They must either have positively approved of his conduct or have neglected to prevent it. In the one case the act complained of is their act. In the other case they are guilty of negligence.

* See Ashley's *Life of Lord Palmerston*, ii. 329.

§ 9. We have yet to consider an essential part of this corporate body—its head, the prime minister or premier. He is, indeed, much more than the mere chairman of a board. The true description of the organ would be the prime minister and the Cabinet, and not merely the Cabinet, for the prime minister exercises functions that are quite his own. He is the chief confidential adviser on all subjects of the Crown. His appointment is strictly the personal act of the Sovereign, one of the few personal acts which, under our system, the Sovereign is required to perform. The conditions of the case are, indeed, so rigorous that, under the penalty of selecting an adviser who could in the circumstances render no efficient service, the choice is usually confined within such narrow limits as hardly to deserve the name ; but when the choice is made, the prime minister becomes the chief and ultimate adviser of the Crown. He recommends to the Royal favour his colleagues. He is the organ of communication between the Cabinet and the Sovereign. His death or resignation dissolves the Cabinet. If, from any cause, he and any member of the Cabinet can no longer work together, it is the dissenting member, and not the chief, that must retire. He is the final referee in disputes between his colleagues, and in cases where any of them has failed to give satisfaction to the Crown. He exercises a general superintendence over each department, and is entitled to know every matter of unusual interest there transacted. In ordinary cases he sits and votes with his colleagues on terms of perfect equality ; but the reserved powers are at all times ready for immediate use. In such circumstances his influence, especially if he be a strong man, is predominant. "Nowhere in the wide world," says Mr. Gladstone,* "does so great a substance cast so small a

The office of prime minister.

* *Gleanings*, i. 244.

shadow ; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative."

As the Cabinet is unknown to the law, so also is the premier. His very title has no English savour. It is a mere popular word, and has no legal or official significance. The Common Law knows nothing of it. It is not found in any statute ; it has no place in the traditions of any of the great services,* or of any state ceremonial. Since the office has no legal existence, it follows that no formal appointment† to it is ever made. The actual official position of the premier is usually that of First Lord of the Treasury. This office is not of the highest official rank. Eight members of the Cabinet take precedence of its holder. The first lord is only the first person named in a commission empowering five specified persons to execute the office of the Lord High Treasurer. All these commissioners have apparently equal rank and equal power. Yet they include the two extremes of the ministerial hierarchy. The first

* When Lord Palmerston, then premier, visited Scotland in 1863, "the captain of the guard ship, anxious to do honour to the occasion, was hindered by the fact that a prime minister was not recognized in the code of naval salutes ; but he found an escape from his dilemma in the discovery that Lord Palmerston was not only First Lord of the Treasury, but also Lord Warden of the Cinque Ports, for which great officer a salute of nineteen guns was prescribed—an apt instance of the minor anomalies of the Constitution under which we live."—Ashley's *Life of Lord Palmerston*, ii. 233.

† An objection has sometimes been made to the official use in Victoria of the title premier. The Victorian Act, No. 91, s. 2, in effect provides that the Governor may from time to time appoint, under any titles that he thinks fit, a certain number of officers who are made capable of sitting in parliament. It is further provided that these officers shall be members of the Executive Council and responsible ministers. The titles of these ministers vary according to circumstances, and it is under this power that a specific appointment as premier is sometimes made. This Act is the first legislative recognition, at least in this colony, of responsible ministers. The expression is now in ordinary use in Acts of the Parliament of Victoria, but no attempt has been made to give it any precise definition.

lord is, as I have said, the premier. His junior lords are those useful but somewhat subordinate gentlemen, whose duties are "to make a House, to keep a House, and to cheer the minister."

It is not easy to fix accurately the commencement of this great office. In its beginnings it was evidently regarded with much jealousy. It was probably under this feeling that the great Common Law offices of Lord High Treasurer and Lord High Admiral were put into commission. Sir Robert Walpole found it prudent to disclaim the style of first minister. Lord Chatham could obtain the means of equipping his expeditions only by threats of impeaching his refractory colleagues. During the personal government of George the Third there was no room for a premier. Lord North objected to the use of this or any similar title, as involving an unfounded claim to precedence. The earliest written description of the office is, I think, a letter* written in 1803 by Lord Melville, under Mr. Pitt's directions. The name premier occurs more than once in the poetry of Burns,† and in circumstances which seem to show that its use was not then uncommon. It is probable that its earliest official use was in the Treaty of Berlin, in which one of the English plenipotentiaries, Lord Beaconsfield, is described as "first Lord of Her Majesty's Treasury, Prime Minister of England." Thus, while in former times there were sometimes first ministers without Cabinets and sometimes cabinets without first ministers, yet the combination of the two which marks our present political system dates only from the end of the last century. As the Cabinet and its powers were the result of various movements, so the position of premier was not determined in a single moment. But the office is essential to the successful

* Earl Stanhope's *Life of Pitt*, iv. 24.

† See "The Jolly Beggars."

working of a Cabinet, and it may therefore be regarded as coeval with that system.*

History of present system of Cabinets.

§ 10. It thus appears that the Cabinet, in the sense of a political committee of the Privy Council acting together as one body, and on the principle of mutual responsibility, and as such subject to a simultaneous and general change, is of very recent origin. Perhaps if we desired to obtain for its establishment a well-marked though approximate date, we might say that this system was unknown in the government of England ; that its gradual formation may be traced in the government of Great Britain ; and that it has been fully adopted in the government of the United Kingdom. It is usual to consider the Revolution as the great landmark in our modern political history. But, although that event forms an essential link in the chain of historical succession, we should regard it rather as a preparation for a later development than as the actual commencement of a new political era. It is to the long administration of Sir Robert Walpole, and not to any earlier period, that we are to look for the first distinct outline of our modern Constitution. It was Walpole who first administered the government in accordance with his own views of our political requirements. It was Walpole who first conducted the business of the country in the House of Commons. It was Walpole who, in the conduct of that business, first insisted upon the support for his measures of all servants of the Crown who had seats in Parliament. It was under Walpole that the House of Commons became the dominant

* For the subjects discussed in this section see, in addition to the references already given, the following authorities :—Todd's *Parliamentary Government*, i. 218-230, *et seq.* ; ii. 114, *et seq.* ; Stapleton's *Canning and His Times*, 179 ; Massey's *History of England*, iii. 213 ; Lord Malmesbury's *Memoirs*, ii. 379.

power in the state, and rose in ability and influence as well as in actual power above the House of Lords.* And it was Walpole, as we have seen, who set the example of quitting his office, while he still retained the undiminished affection of his King, for the avowed reason that he had ceased to possess the confidence of the House of Commons. Even in minor points we may trace during this period the commencement of many modern usages. It is from that time that the First Lord of the Treasury has been regarded as the head of the ministry.† It is from that time that the practice of asking questions of ministers in open Parliament regarding public affairs has prevailed.‡ It is from that time that the courtly Lords and the faithful Commons began to echo in their replies the sentiments of the Royal speech with which the session of Parliament is opened.§ And it was in the case of Walpole that the last attempt was made to proceed by impeachment against a minister on the grounds not of malversation in office, but of his general policy. Since the failure of that vindictive attempt, political impeachments have been unknown.

If, again, it were required to indicate the period at which our modern system of ministries may be regarded as permanently and completely established, it seems to me that we must look to Lord Grenville's administration in 1806. The quarter of a century that had intervened since Lord Rockingham's second ministry, had done much to confirm the principles of Constitutional Government. But although Mr. Pitt well understood and carried out constitutional principles, his position during his long administration more closely resembled that of Walpole than that of any modern

* See Buckle's *Hist. of Civ.*, i. 409.

† Earl Stanhope's *Hist. of Eng.*, iii. 158; Macaulay, ii. 255.

‡ Lord Campbell's *Chancellors*, iv. 206.

§ *Ib.*, 622.

premier. His great ability, his popularity, and above all the appreciation of his services by the King, overshadowed the remainder of the Cabinet. Even on questions of vital importance he did not take the opinion of his colleagues. Thus the resolution to proceed with the Roman Catholic Relief Bill, a measure which led to Mr. Pitt's resignation, was adopted without any communication on the subject with the Lord Chancellor.* Such an authority was exceptional, and could scarcely exist at the present day. If we must have a precise date, we can select none so close as that of the "ministry of all the talents." That ministry was formed on the express understanding that the personal antipathies of the King were to give way to the exigencies of the public service.† It was then established that the army, which had always been regarded, and has even since been by eminent authorities regarded, as in a special manner pertaining to the Crown, should cease to be subject to the direct control of the King through the Commander-in-Chief. Distinct stipulations were made at the formation of that ministry to ensure on certain specified questions uniformity of ministerial action. In connection, too, with one of its appointments, that of the Chief Justice to a seat in the Cabinet, there was a remarkable debate in both Houses, in which the nature of the Cabinet was largely discussed, and which is said,‡ although perhaps too strongly, to have affirmed the doctrine that the Cabinet is not a body recognized by the Constitution, and that the responsibility of each minister for the acts of his colleagues is only a moral and not a legal responsibility.

The result, then, of our inquiries may thus be stated.

* See Massey's *Hist. of Eng.*, iv. 505, 545; Lord Stanhope's *Life of Pitt*, iii. 242.

† Sir G. C. Lewis's *Administrations of Great Britain*, 287.

‡ *Ib.*, 290.

About the period of the Restoration there may be distinguished the development of a special organ for the exercise of the political functions of the Privy Council. During the reign of William the Third this committee of council for matters of state was usually selected with reference to the influence of its members in both Houses of Parliament. But prior to the accession of the House of Brunswick there was no system of concerted action and no mutual responsibility between the servants of the Crown; there was no means of determining the policy of the Crown by presenting the alternative of a general resignation, and there was no ready means of changing the ministry in accordance with the views of Parliament. Under Sir Robert Walpole the modern system, in most at least of its features, was established. It was to a great extent discontinued under his successors; but was revived at various intervals and with varying success during the reign of George the Third. Under his two sons, and still more completely in the earlier part of Her Majesty's reign, the principles and the practice of what is now called Parliamentary Government were firmly established. The policy of the Crown has since that time been determined on the whole by the advice of its ministers; and the ministry is changed at the time of the changes of feeling in public opinion, and in conformity with those changes.

CHAPTER IX.

THE RELATION OF MINISTERS TO PARLIAMENT.

§ 1. Although it be at the risk not only of stating but of reiterating a truism, I must again observe that the great officers of state usually known as ministers are the servants of the Crown. The first duty of such a minister is to protect and maintain the interests of his Sovereign. On some occasions he will best promote that interest by retiring from the Royal service. He may feel bound to decline to assist in a policy which he disapproves ; or he may seek by a sacrifice of himself to silence those envious tongues that might else assail his master. But there are other occasions on which an equal devotion is shown by his retention of office. A servant of the Crown must control the impulses of wounded self-love and offended dignity. He must not hastily abandon the duty he has undertaken because his counsels may not always be acceptable to Royalty, or because in Parliament his projects of law sometimes miscarry, or because out of doors some senseless cry is raised against him. The vassal was bound to aid his lord as well by his counsel as by attendance in his courts and service in the field. The same obligation has descended to us. The law imposes upon every man the duty of responding to his Sovereign's demand for advice and assistance : and the loyalty and

Ministers resign only when impeded in their duty.

devotion which the tie of fealty once engendered still finds a response in the hearts of British statesmen. The error, indeed, has hitherto been that from a chivalrous though erring devotion our statesmen have sometimes lent themselves to support, contrary to their better judgment, the personal wishes of the King. So Lord Waldegrave was willing in a great emergency to endeavour to carry on the Government of George the Second. So Lord North in an evil hour submitted himself to the will of George the Third, and for twelve disastrous years bore the obloquy of a policy which he condemned. Nor does history present a more striking picture than the courageous loyalty of the Duke of Wellington, prepared to undertake as often as he was required the government of the country with the same prompt obedience as he would have taken the command of a brigade, and ready, without any question of its prudence or any regard to the consequences to himself, alike to assume office or to leave it at the word of command.

A better appreciation of constitutional principles has to a great extent taken away the occasion for such appeals and the necessity for such sacrifices. It is now necessary rather to enforce the claims of the Crown than to insist upon the need of controlling it. In our days of political combinations and ministerial crises, men are too ready to forget their duty to their Sovereign and their obligations to the public. In the Colonies, if not in England, office is sometimes heedlessly accepted, and as heedlessly abandoned. But it was urged by Sir Robert Peel * that, "when a public man at a crisis of great importance undertakes the public trust of administering the affairs of this country, he incurs an obligation to persevere in the administration of these affairs as long as it is possible for him to do so consistently with

* *Speeches*, iii. 116.

his honour. No indifference to public life, no disgust with the labours which it imposes, no personal mortifications, no deference to private feeling, could sanction a public man in withdrawing on light grounds from the post in which the confidence of his Sovereign had placed him." Acting upon the views he thus expressed, Sir Robert Peel, who had, in his absence and against his better judgment, been by the special act of the King called to office, maintained for some time a hopeless contest ; and relinquished it then, and not until then, when it became apparent that his efforts were fruitless, and that a continuance of his administration would only involve both his Royal master and the country in further embarrassment. The precedent of 1835 proves indeed that ministers are bound to give way to an adverse House of Commons, even though no direct vote of censure or want of confidence has been passed against them ; but it also proves something more. It shows that a public man, when his Sovereign calls upon him to take office, is not at liberty on any other than public grounds to refuse the call ; and that when such a person has accepted the duty, he is bound to continue at his post as long as he has any reason to think that his services are useful. If he can carry on the Queen's Government with advantage to her and without discredit to himself, he is to remain ; when he finds that from whatever cause he can no longer do so, it is time for him to retire.

Impediments arising from the King.

§ 2. There seem to be three sets of circumstances in which the relation of the King to his ministers has been such that their continuance in office could not be expected. These circumstances may be deduced from the very nature of the ministerial relation. It is the duty of the ministry to advise the King upon the exercise of his various prerogatives, and to carry into effect

the policy which, in accordance with their advice, he has determined to adopt. Ministers, then, ought to be free to offer any advice that the circumstances of the time may in their judgment require. They may reasonably expect that, in all matters at least of national importance, the advice which they tender shall be followed. They are also entitled, while they remain the recognized chief servants of the Crown, to receive in the performance of their duty the full confidence of their Royal master. We have accordingly in our modern political history examples where on the failure of each of these conditions ministers have felt themselves unable to continue in the service of the Crown.

Ministers are bound by their oaths as privy councillors and by the manifest duty of their office to give the King true counsel to the best of their judgment. It would, therefore, be inconsistent with their oath and duty if they were bound not to give on any particular subject, whatever might be the exigency of the peril, such advice as they considered best suited to the nature of the case. Such a pledge George the Third, more mindful of the supposed obligation of his own oath than of that of other men,* desired on more than one occasion to obtain from his ministers. During the American war His Majesty declared† that he expected to receive from any new administration which he might form a specific promise in writing that they would in no circumstances consent to the dismemberment of the empire. In 1807 he required from Lord Grenville's ministry a similar pledge that they would never propose to him any measures connected with Catholic Emancipation. Lord Grenville and his colleagues refused to make any such engagement; and their Government was accordingly dissolved. The subject was discussed in both Houses of

* See *Court and Cabinets of Geo. III.*, iv. 143.

† May's *Const. Hist.*, i. 42.

Parliament ; and, although Parliament refused to enter upon an inquiry in which the personal conduct of the King was involved, it was agreed on all sides,* and ultimately, as it seems, even by the King, that ministers ought not to be required to give any pledges to abstain from advice of any sort.

The first occasion on which a ministry resigned because the King declined to adopt its advice was the resignation of Mr. Pitt in 1801. Some measure of relief to the Roman Catholics formed a part of Mr. Pitt's scheme of Irish policy ; and he and his colleagues were pledged to the Irish Catholics to support some such measure. On this subject, however, the King was inflexible. He positively refused his consent to the introduction of the proposed measure ; and upon this refusal Mr. Pitt and several of his principal colleagues tendered their resignation. Nearly thirty years afterwards the same subject had almost proved fatal to a third administration. When the Duke of Wellington and Sir Robert Peel, in 1829, had become satisfied that the time had arrived at which the concession of the Roman Catholic claims could no longer be delayed, they proposed to King George the Fourth the introduction of the Roman Catholic Relief Act. The King refused his consent. The ministers tendered their resignation ; and underwent in token of its acceptance the Royal kiss of peace. On further consideration, however, His Majesty desired them to withdraw their resignation, and consented to the introduction of the measure, to which in due course he gave his Royal assent.

It might be supposed that when the King accepted any persons as his recognized advisers, and consented to adopt any policy which they had proposed, he should give them

* Lord Colchester's *Diary*, ii. 119. See, as to the King, R. P. Ward's *Memoirs*, i. 256.

in the execution of that policy all the assistance which the lawful authority of the Crown could afford. But, as we have already seen, former princes did not always take this view of their duty. When George the Second found that he was obliged to accept the united administration of the Duke of Newcastle and Mr. Pitt, he reluctantly released from the impracticable task his faithful adherent Lord Waldegrave, upon whom he had imposed the unwelcome duty of attempting to carry on the government. The parting interview of the King and his favourite servant was of the tenderest character. After many assurances of his devotion, Lord Waldegrave comforted the desponding monarch by pledging himself to be ready on all proper occasions to oppose His Majesty's ministers and His Majesty's son.* It is needless to repeat how the King's friends in the reign of George the Third never voted with the King's ministers, merely as such. George Grenville in his bitterness of spirit declared† that he would never again hold power at the will of a set of janizaries who were at any moment ready on the word of command to tighten the bowstring round his neck. In the Regency‡ Lord Grenville showed a strong reluctance to take office, from a rooted distrust of the sincerity of the Regent, and the conviction that with the son, as with the father, a strong Court influence would be actively exercised to undermine him. The last occasion on which a difficulty of the kind was apprehended, or at least led to any practical consequence, was the bedchamber question of 1839. Probably that case may be regarded as the final acknowledgment of constitutional principles. It was certainly somewhat hard to insist upon the inclusion among political functionaries

* Lord Waldegrave's *Memoirs*, 137.

† *Bedford Correspondence*, iii. 28.

‡ See *Court and Cabinets of Geo. III.*, iv. 426; *Mem. of Reg.*, i. 224.

of a young Queen's favourite companions. It was, however, right to show in the fullest and most complete manner that Her Majesty, although she made no secret of her personal wishes, gave to the ministers whom she appointed her unreserved confidence; and that no distinction now existed between the official will of the Crown and its secret inclination. Although on that particular occasion the former ministers were enabled to continue the government, the point in dispute was two years afterwards silently conceded; and all Her Majesty's ministers have been unanimous in attesting the thorough good faith and fair treatment that in their dealings with this Royal lady they have invariably experienced.

Impediments arising from the Lords.

§ 3. There are few instances of the resignation of a ministry in consequence of any impediment presented by the action of the House of Lords. The explanation of this fact is found in that relation of our double-chambered system which in a previous chapter I attempted to indicate. Ministers have, in the case of a hostile vote in the House of Lords, the opportunity of obtaining a contrary vote in the House of Commons; and although the Lords may always reject a ministerial bill, it is seldom that the proposed legislative change is so important as to require such an extreme course as resignation. On one memorable occasion, indeed, ministers did resign on a defeat in the Lords of a bill on which they had staked their official existence. Lord Grey and his colleagues were prepared to resign on the loss of the second Reform Bill in 1831.* But both the wish of the King, and a vote of confidence carried by a large majority in the House of Commons, induced them to

* Roebuck, *Hist. of the Whig Ministry*, ii. 217.

make a further trial. In the following session the ministers again sustained in the House of Lords a defeat which they regarded as fatal. They asked the King for permission to create a sufficient number of Peers; and upon his refusal tendered their resignation. Subsequently, however, they were recalled; the required authority was given, and as we have already seen the bill was carried without, fortunately, the exercise of the power.

It may indeed be said that even this case does not come within the rule; and that the impediment was created by the refusal of the King, and not by the vote of the Lords. I have already stated the grounds on which I think that the proposed creation of Peers was indefensible. It is indeed true that the state of excitement to which the public mind was worked in the year 1832 renders difficult the application to that period of the principles which would prevail in less troubled times. Yet even then these principles must have speedily asserted their force. When the Opposition found the impossibility of forming an administration and the necessity which existed for some prompt decision of the question, the natural solution of the difficulty could have hardly failed to arrive. The King's Government must be carried on. The Opposition were not able to carry on that Government, and at the same time maintain the existing law. They were therefore bound not to prevent that change in the law without which their adversaries were not prepared to incur the responsibility of office. This view seems to have been in effect adopted in the great Commercial Reform of 1846. In November, 1845, the administration of which Sir Robert Peel was the chief differed upon the proposed Repeal of the Corn Laws. The number of the dissentients was so great, and the differences seemed so irreconcilable, that the ministry resigned. The Protectionist section of the retiring ministry

professed its inability to form an administration; and Lord John Russell, who undertook the task, was, after several ineffectual efforts, compelled to abandon it. Her Majesty had thus no other resource than to recall her former ministers. They all, except Lord Derby, returned. The dissentients, most of whom were Peers, withdrew their opposition and supported the bill. In the House of Lords, although it was believed that landed proprietors would incur from the operation of the change a severe pecuniary loss, the measure was carried by a large majority. All other means of conducting the government of the country had been tried and had failed. In these circumstances there was surely much force in the Duke of Wellington's remark that "the formation of a Government in which Her Majesty would have confidence was of much greater importance than the opinions of any individual on the Corn Laws or on any other laws."*

So too in 1849 a bill for the repeal of the navigation laws was introduced by the ministry and was passed by the House of Commons. There was reason to believe that opposition would be made in the Lords, and that that opposition would be successful. The ministry determined to stake their existence upon the measure, and announced their intention accordingly. "It seems," says Lord Campbell,† describing the crisis, "strange *primâ facie* to allow the Lords to subvert the Government against the will of the Commons; but we were so circumstanced that we could not have held office with any dignity or advantage after the loss of this measure, and we should have been so discredited that we must soon have been kicked out on some ignoble occasion. Had we not formed and announced this resolution, the measure would certainly

* 3 *Hansard*, xxvi. 146. † *Life*, ii. 251.

have been lost; the dread of a change of ministry and of a dissolution of Parliament has carried us over the second reading. Our chief prop is the Duke of Wellington. . . . Prince Albert wrote to the Duke, and begged him to consider not only the merits of the Navigation Bill but also the consequences of its rejection, and received a favourable answer."

§ 4. The impediments to administration which the House of Commons may offer are either direct or indirect. They may exist in the form either of a vote of censure upon some particular part of the administration, or of general want of confidence, or of the rejection of some measure proposed for its approval and regarded by the ministry as essential to the successful performance of its duties. Of the direct interference of the House of Commons examples are almost superfluous. Through all periods of our history addresses have been presented to the Crown for the removal of some obnoxious minister. Such was the mode of attack upon Sir Robert Walpole which, though unsuccessful, heralded his fall. In later times, since the more complete establishment of the ministry, the address for the removal of an individual minister has been gradually changed into a vote of censure upon some part of the policy of the administration, or into a vote of general want of confidence. Some examples of votes of censure have been already cited. The two most recent cases are the censure upon the Chinese war in 1857, and the censure upon the negotiations with the French Court in the matter of Orsini's conspiracy in 1859. The vote of want of confidence is of recent origin. The earliest motion of the kind, so far as I am aware, was made, though unsuccessfully, in 1782 against Lord North's

Impediments arising from the Commons.

administration.* Since that time it has become a favourite weapon of Parliamentary warfare. It was fulminated more than once in the contest of 1784. It was revived in 1841 by Sir Robert Peel against the second Melbourne ministry; and it has been freely used in recent contests.

There can be no doubt of the right of the House of Commons to express its partial disapproval of the administration, or its general dissatisfaction with its formation or with its policy. But there can be, also, no doubt that this right is one which ought to be exercised sparingly, and only on important occasions. It is a great power placed in the hands of the Commons, not for mere party purposes but for the public benefit. Its misapplication only serves to blunt it when it is applied to its proper use. Besides, the House of Commons acts in this matter as the adviser of the Crown. It may disapprove of the existing administration or any of its acts; but it ought not to be so hard to please as to render all government impossible. Those persons who overthrow any administration may expect to be required by the King to assist him in the room of those officers whom, in consequence of their proceedings, he had displaced. Nor is a statesman who is so summoned at liberty to refuse. He has taken upon himself the responsibility of obstructing the government of the country. If he desire to save himself from the imputation of mere faction, he must endeavour to set up in its place a better government. The King may fairly address his Commons in the language of the philosophic poet to his friend, "*Si quid novisti rectius istis, Candidus imperti; si non, his utere mecum.*"

§ 5. When Parliament directly and in express terms censures the conduct of ministers, or declares its general

* Massey's *Hist. of Eng.*, iii. 70.

mistrust towards them, no difficulty respecting the course which that ministry should pursue can arise. But the withdrawal of Parliamentary confidence may be also expressed indirectly; and it is not always easy to ascertain those indirect indications of mistrust which justify the resignation of a ministry. On this subject two theories, supported each by distinguished names, have been proposed. According to one view, the confidence which Parliament is asked to give is a confidence in the ministry as administrators. According to the other view, it is a confidence in the ministry as legislators. The former opinion was maintained by Lord Macaulay: the latter by Sir Robert Peel. In the debate which led to the dissolution of Parliament in 1841, Lord Macaulay,* then a Cabinet minister, contended that "it was the first duty of the ministers of the Crown to administer the existing law. If the House of Commons did not place sufficient confidence in the Government for this purpose, it might express its opinion either directly or indirectly:" and he denied that it could be called a want of confidence if the House withheld its assent from any new legislative measure or refused to sanction the alteration of an old law. Sir Robert Peel,† on the other hand, denounced this doctrine as "unconstitutional and dangerous, discouraging to public men and fatal to the energies of a Government." He denied the possibility of drawing a line between acts of legislation and acts of administration; censured in strong terms the system of "open questions;" and declared his opinion that "the character of an administration, their claim to public confidence, is infinitely stronger on account of their legislative measures than on account of their administrative acts." At a later period, when the angry

Different theories as to Parliamentary confidence.

* *Speeches*, i. 342. † *Speeches*, iii. 775.

disputes connected with the Melbourne ministry had been forgotten in still more angry disputes and still more exciting events, the grave historian deliberately repeats the doctrine which in his struggle for office the brilliant partisan had so warmly advocated. In that passage of his great work in which he describes the institution by which the House of Commons is enabled effectually to control the executive administration, Lord Macaulay* declares that in Parliament the ministers are bound to act as one man upon all questions relating to the Executive Government; and the illustrations with which he supports his position, and which I have cited in a preceding chapter, are all selected according to this view.

§ 6. It seldom happens that when two eminent men advance opposite opinions the one is wholly right or the other wholly wrong. The one generally errs by excess, the other by deficiency; and each serves to correct or to limit the other. Sir Robert Peel never denied that ministers were responsible for their administrative as well as for their legislative conduct. Lord Macaulay expressly admits that an administration is bound to resign if it be impressed with the conviction that the legislative change which it unsuccessfully proposed is of such a nature that without that change it cannot carry on the public service. In these mutual concessions, then, we may perceive the true principle. Ministers must possess the full confidence of Parliament in their administrative integrity and skill; and that confidence must be shown not only by a refusal to censure their proceedings, but by a readiness to enact such measures as the ministers may declare to be in their opinion essential to the proper

Reconciliation of these theories.

* *Hist. of England*, iv. 435.

administration of the existing laws. But it is not requisite that Parliament, if it have confidence in a minister as the administrator of the law as it is, should have equal confidence in the same person as an adviser respecting the law as it ought to be. On questions with which he is specially conversant the minister in his place in Parliament speaks with authority. On questions which do not affect, or only indirectly affect, the actual administration of public affairs, the opinion of a minister should merely go for what it is worth. He is an administrator, not a jurist. He exercises, indeed, a double function. He is the servant of the Crown, and he is a member of the Legislature. But in criticising the conduct of the minister we are not to take into account the failures of the member. Success in the one sphere doubtless contributes materially to success in the other. But the two functions are distinct, and should be separately judged. The test, then, of the influence of any legislative measure upon the fate of any ministry, whether its own proposal be rejected or a bill to which it was hostile be passed, is the same as that which in ordinary circumstances determines their retention or their abandonment of office. There is one question which must always be uppermost in the mind of every servant of the Crown: "How is the Queen's Government to be carried on?" If the measure, or the loss of the measure, do not affect, or affect in but a slight degree, the administration of the existing law, ministers are bound, however much they may disapprove of the innovation, or however much they may regret the loss of their proposal, to continue in office. If, on the contrary, a serious and immediate change in the practical working of Government be introduced, ministers cannot be required to incur a responsibility against which they protested. When such an obstacle occurs, it is immaterial from which branch of the Legis-

lature it proceeds. If there be any measure without which the ministers consider that they cannot conduct the public service, and if that measure be rejected either by the Crown or by the House of Lords or by the House of Commons, the ministers are not bound to undertake a duty for which in their estimation their powers are inadequate.

The principle which I have thus attempted to state may perhaps be considered vague. Even if it were so, it would be better than the absence of any principle and a resignation at the discretion of the Premier upon every casual defeat in Parliament. But in truth the apparent vagueness of the principle is merely the ordinary difficulty in the application of a general rule. With whatever precision a principle may be defined, the question must always remain whether any given state of facts is or is not included in it. In the present instance the decision must rest with the ministers themselves. It is for them to determine whether any particular proceeding of the Legislature will prevent them from efficiently conducting the public service. They make their decision under a heavy responsibility. Their character as public men is at stake. If from moral cowardice or from petulance they wantonly forsake their trust, their Sovereign may well decline again to receive as advisers men who have abandoned their posts in the hour of need. Public opinion, too, and the representatives in Parliament of that opinion, will not fail to visit with severe and deserved punishment the recreant minister who preferred his own ease or the gratification of his petty resentment to his duty towards his King and his country.

§ 7. It is not, however, upon any general reasoning or upon the *dicta* of any men however eminent that the determination of such a question must depend. We must deal

with it as with any other case of customary law. We must examine the precedents, and endeavour from them to deduce some general rule. If the generalization thus obtained concur with the results to which our deductions from the nature of the office have led us, the proof will be complete. I propose therefore to inquire whether there be any instances in which ministers, notwithstanding the rejection of important measures which they had presented to Parliament, still continued in office; and, again, whether there be any instances in which ministers have resigned for any other cause than some impediment to their administration of public affairs.

Precedents of ministerial resignations.

The precedents of the last century are, for reasons which I have already stated, not very valuable in determining our modern constitutional practice. They have, however, some weight. We find then, after the accession of the House of Hanover, the rejection by the House of Commons of the Peerage Bill of 1719: but Lord Sunderland and Lord Stanhope never even thought on that account of leaving office. Sir Robert Walpole was obliged to abandon his project of Excise Reform: but he continued as minister for some years after his defeat. In Lord Chatham's ministry the House of Commons actually refused a part of the Ways and Means for the year,* and would not sanction the proposed increase of the Land Tax. Yet so serious a disaster did not lead to the displacement of the ministry. Even in the triumphant administration of the younger Pitt the House of Commons on more than one occasion rejected his proposals. He was defeated on the Westminster scrutiny. He failed to carry in the Irish Parliament his commercial policy towards Ireland. His Reform Bill was

* Massey's *Hist. of Eng.*, i. 307.

lost by a large majority. Even his plan for the defence of the coast and for the fortification of Portsmouth and Plymouth was rejected.* These defeats, and especially the loss of his Irish propositions and of his scheme for the fortification of the dockyards, were subjects of bitter mortification to Mr. Pitt; yet neither he nor his opponents appear to have thought that he was under any obligation to resign. These precedents of Mr. Pitt have a double interest. On the one side the events themselves curiously illustrate the supposed strength of the "strong governments" before the Reform Act. On the other side the course which Mr. Pitt then adopted seems conclusively to show that a minister, who is conscious that he retains the general confidence both of the King and of Parliament, is not required to resign because some of his most important legislative proposals have not been accepted. For the practice in later times I need only refer to that long list of measures which, as I have before observed, the House of Lords, sorely against the will of the ministers of the day, either rejected or largely modified. In our own days we have seen more than one Reform Bill, a name once of magic potency, quietly set aside without any detriment to the ministry that proposed it.

It thus appears that ministers, even when defeated on very important measures† of legislation, have not thought it their duty to resign. A similar inquiry will show that on every occasion before 1841, and in most cases after that date in which a resignation of any ministry has taken place, the immediate cause has been some difficulty in administration. It will be sufficient for the present purpose to commence with the reign of William the Fourth. During the reigns of the last two Georges the ministerial changes

* See Earl Stanhope's *Life of Pitt*, i. 254, 272, 275, 288.
† See Todd's *Parl. Govt.*, i. 132.

were occasioned either by the immediate action of the King or by disputes with him, or by the death or incapacity of the Premier. To the first class belong all the changes of administration in the earlier part of the reign of George the Third. To the second belong the resignation of Mr. Pitt, of the Grenville ministry, and of the Duke of Wellington and Sir Robert Peel before the introduction of the Emancipation Act. To the third belong the second administrations of Lord Rockingham and of Mr. Pitt respectively, and all the changes that ensued between the formation of the Portland ministry in 1807 and the death of Mr. Canning twenty years afterwards. Of the administrations not included under these classes two, that of the Duke of Grafton, and at a later period that of Lord Goderich, fell from internal dissensions: while those of Lord Shelburne and of Mr. Addington* were either defeated or received what they regarded as insufficient support on questions of administration. Lord Shelburne was defeated on the merits of the peace of Versailles. Mr. Addington had but a small majority in favour of his scheme of the national defences. But the precedents of the last and of the present reign are more complete. On one occasion only did the spontaneous exercise of the prerogative produce a change of ministers; and no Premier except Lord Palmerston and Lord Derby has during that period died in office or resigned from broken health. All the changes, therefore, that have taken place since the death of George the Fourth have been of a strictly political character. It will, I think, be found that no ministry, except that of Lord Russell, has left office on a purely legislative question, but that the retirement of each successive administration has been caused by defeats either on

* Massey's *Hist. of Eng.*, iii. 146.

matters relating directly to the Executive Government or on legislative measures immediately affecting their ability to conduct public affairs. The administration of the Duke of Wellington resigned upon its defeat on the Civil List, which at the commencement of the new reign it had proposed. I have already spoken of the resignation of Lord Grey upon the defeat of the Reform Bill in the House of Lords. Two years afterwards Lord Grey resigned in consequence of dissensions in his Cabinet. His ministry was continued under Lord Melbourne, was summarily dismissed by the King, and was succeeded by Sir Robert Peel's short administration. Sir Robert Peel, after sustaining several other defeats, resigned upon his defeat on the Irish Tithes question. He assigned as the reason of his resignation that the result of this vote would place such difficulties in the practical administration of Government in Ireland by parties opposed to the principles of this vote that they were fairly entitled to decline a responsibility which others were bound to incur.* In 1839 the Melbourne administration resigned because it had a majority of only six on its Bill for suspending the Constitution of Jamaica. The authority of the Crown, it was said, was so weakened in the colonies by the apparent support given by Parliament to the contumacious Assembly of Jamaica that Lord Melbourne and his colleagues could not undertake to govern them. The retiring ministers, however, returned to office in consequence of the "bedchamber dispute;" and it was upon a direct vote of want of confidence that two years afterwards they made way for Sir Robert Peel. The ground upon which principally the hostile vote was carried was the deficit of the public revenue during their administration. At the end of 1845 Sir Robert Peel, in

* *Speeches*, iii. 117.

consequence of dissensions in his Cabinet respecting the proposed repeal of the Corn Laws, resigned. The failure of the potato crop had in his judgment rendered it impossible to administer the Government without a change in the commercial and financial policy of the kingdom. He subsequently, as we have already seen, withdrew his resignation and succeeded in carrying the repeal of the Corn Laws. But he was defeated by a large majority on a Bill for the Protection of Life in Ireland, and accordingly announced that "as the House refused to Her Majesty's servants those powers which they deemed necessary for the repression of outrage and the protection of life in Ireland, they have felt it to be their duty to tender their resignation to a gracious Sovereign." * Lord John Russell was defeated on the Militia Bill, a question which not only affected the national defences, but involved grave financial considerations. The Earl of Derby's first ministry was defeated on its Budget. The administration of Lord Aberdeen came to an untimely end in consequence of a defeat arising from its ill success in the conduct of the Crimean war. Lord Palmerston was compelled to yield to a vote of censure for the manner in which the correspondence with the French Court relating to the conspiracy of Orsini was conducted. Lord Derby's second administration likewise fell before a direct vote of want of confidence.

The principal authority for the doctrine that ministers are responsible for the success of their bills is the resolution of the House of Commons which led to the dissolution of 1841. Lord Melbourne's administration, which had for some time shown symptoms of weakness, was defeated by a considerable majority on its proposal to reduce the duties

* *Speeches*, iv. 709.

upon sugar. The Cabinet took time to consider its course; and finally resolved to proceed as before, and moved the original sugar duties. Sir Robert Peel consequently moved* "That Her Majesty's ministers do not sufficiently possess the confidence of the House of Commons to enable them to carry through the House measures which they deem of essential importance to the public welfare; and that their continuance in office under such circumstances is at variance with the spirit of the Constitution." It was in the debate on this resolution that the discussion upon the theory of ministerial responsibility to which I have referred took place; and the motion was carried by a majority of one. The terms of this resolution, so far from being inconsistent with the proposition that I have laid down, actually confirm it. Apart from its application to this particular case, the general principle which the House then affirmed was that the continuance in office by ministers when they are unable to carry measures which they consider essential to the public welfare is unconstitutional. It is therefore the opinion of ministers themselves that must determine the character of each particular measure on which they are defeated. But the test of the essentiality of a measure is the readiness of ministers to incur the responsibilities of administration without it. If ministers be willing, notwithstanding the loss of their measure, to continue the administration of public affairs with their former powers only, the measure, however important it may be, cannot in their opinion be essential. If it be essential, or, in other words, indispensable in existing circumstances for the public welfare, they would reasonably decline to administer public affairs in the absence of those conditions under which alone success could, in their opinion, be accomplished. But even

* *Speeches*, iii. 759.

if this resolution bore a wider sense, I should not think the precedent decisive. Resolutions of the House of Commons declaratory of any general proposition of law have seldom much weight. The House has always been more successful in accomplishing some practical purpose than in establishing a general principle. Its proceedings afford materials from which such principles may be deduced ; but an abstract resolution of the House, unsupported by the weight of previous authority and not habitually followed in practice, cannot counterbalance a principle founded upon general reasoning and verified by constant usage. In 1841 the House wished to express its dislike to the existing ministry ; and members, when they voted that the continuance in office of that ministry was contrary to the spirit of the Constitution, were much more concerned for their conclusion than for the reasons which led to that conclusion. Sir Robert Peel* cited in support of his motion his own conduct in 1835. He said that he in that year did indeed carry on for a short time an unequal contest in opposition to the power leagued against him, but that the first time he was obstructed in an act of legislation, he that moment felt it to be his duty to retire from the management of public affairs. But this view of the events of 1835 is hardly supported by the facts. When Sir Robert Peel announced in that year his resignation, he was careful to point out that the vote on which he was defeated not only in its nature amounted to a vote of a want of confidence,† but implied the necessity of such a change of system in the ecclesiastical affairs of Ireland that he could not consent to carry it into execution.

The other cases which favour this view occurred in 1851, in 1859, and in 1866 respectively. In the first of these

* *Speeches*, iii. 761. † *Ib.*, 116.

years Lord John Russell's administration resigned on the ground that they had but a small majority against a motion of Mr. Disraeli which was substantially a movement in favour of a return to protection, and that they were defeated, though in a thin house, upon a motion by Mr. Locke King for leave to bring in a Bill for the Extension of the Franchise. After the failure of three successive attempts to form a new administration, Her Majesty intimated her wish that her former ministers should resume their offices, and the Royal commands were accordingly obeyed. The reasons assigned for this resignation seemed so insufficient that Lord Derby* did not hesitate to express to Her Majesty his doubts that they formed the sole and even the principal ground for that resignation. If indeed they were the real causes for that step, the inconvenience of the prolonged ministerial crisis and the subsequent return of the ministry to office seem to indicate that the resignation was unjustifiable. In 1859 Lord Derby's ministry was defeated on its Reform Bill, and avoided resignation by a dissolution. The inconveniences to which this dissolution gave rise were even greater than those which result from a prolonged crisis. Apart from many other objections to which it was exposed, it left, as we have already seen, the country without a Parliament for two months at a time when war was hourly expected ; and it compelled the Executive to incur the responsibility of increasing without the sanction of Parliament the naval and the military armaments of the country. The same cause which led to the dissolution of 1859 produced the resignation of 1866. Lord Palmerston's administration had continued for the natural duration of one Parliament ; and in the newly-elected House of Commons it com-

* *Ann. Reg.* 1851, 30.

manded a great majority. Upon the death of their chief this ministry resolved to introduce a bill for the extension of the suffrage, and publicly staked their existence upon the success of the measure. Their supporters received the bill with great dislike, and in some cases with open revolt. But so far from showing any hostility to the ministry in other respects they avowed their general satisfaction with the administration of public affairs, and their reluctance to any change in Her Majesty's council. Ultimately the bill failed and the ministry resigned. They were distinctly pledged to this course, and the pledges of public men should be maintained. But unless a resignation were from the circumstances of the case justifiable, no such pledge should have been given. The embarrassment of the ministry was of their own creation. They had successfully conducted during six years the affairs of the country under the old franchise. Even if an alteration in that franchise were desirable, it could not be pretended that the necessity for such a change had suddenly become so urgent that the country could not be governed without it. A general election had just taken place. There was no unusual demonstration of public opinion. The peace of the country was uninterrupted. The absence, indeed, of any considerable political excitement was one of the arguments in favour of dealing with such a question at that particular time. When in such circumstances a ministry resigns, it incurs the risk of a serious defection among its former supporters. The Queen's Government must be carried on. The new ministers, therefore, if they have succeeded to office not by any intrigue on their part, but by the default of their predecessors, may justly claim a fair and generous support from many of those whose sympathy they could not otherwise have expected.

To me, therefore, it appears that these cases, so far from

strengthening the position that legislative success is essential to ministerial power, furnish clear examples of the impropriety of that rule, and of the danger of departing from the beaten paths of the Constitution. If in any of these cases the House of Commons had desired a change of ministry, it might have asked for such a change. When no such request was made and when no actual impediment was presented to the conduct of government, the ministry ought to have remained in their places. It is unreasonable to coerce Parliament in the exercise of its legitimate functions on questions unconnected with administration by a threat of all the interruption to public business and all the inconvenience and delay that are inseparable either from a ministerial crisis or from a dissolution.

Open questions.

§ 8. The principle that the confidence which Parliament reposes in the servants of the Crown is a confidence in their administrative and not in their legislative power serves to explain a difficulty which sometimes presents itself in our political arrangements. There are sometimes questions upon which the members of the administration, notwithstanding their general obligation of mutual support, are avowedly free to act according to their individual opinions. It is therefore a matter of some importance to decide what questions ought to be thus left open, and what should be regarded as ministerial. No distinct rule has, so far as I am aware, been laid down to guide such decisions. But from the point of view I have attempted to indicate, the principle seems distinct and intelligible. If a ministry ought to resign when only it is defeated upon great administrative measures, none but measures of administration ought to be made ministerial questions. All other questions which do not affect the ministry as such—that is, which do not impede the conduct

of Her Majesty's Government—should be open. For the proper conduct of the public service there must be amongst ministers a general agreement as to the manner in which that service should be carried on. As, then, no question which is not a question of administration should displace ministers, so no question which is not a question of administration should be made a ministerial question. It is upon all questions relating to the executive government that, according to the dictum of Lord Macaulay, in Parliament the ministers are bound to act as one man. For the proper administration of public business ministers are jointly and severally responsible. For the measures which Parliament thinks fit to enact, they have, until they are called upon to administer them, no further responsibility than that of ordinary members of either House. Their agreement of partnership must be taken to extend to matters of administration only, and not, except incidentally, to matters of legislation.

This principle also explains why the same questions have at one time been regarded as open, and at another time have been treated as ministerial. They were open so long as they did not affect the practical working of Government. They became ministerial when their settlement became necessary for the proper administration of public affairs. For many years the question of Catholic Emancipation remained open. At length the Duke of Wellington found that its settlement was essential to the peace of the country, and all the members of his administration were required to support the measure accordingly. In like manner Parliamentary Reform did not become a ministerial measure until opposition to it or delay in its settlement seemed to threaten civil war. Lord Melbourne declared that the repeal of the Corn Laws was the wildest idea that ever entered the mind of man ; yet at that very

time several free-traders were members of his Cabinet. A few years afterwards Sir Robert Peel made this very question of the Corn Laws the basis of a reconstruction of his Cabinet, because he would not undertake the responsibility of executing them when a famine was impending. The Ballot and Short Parliaments were for many years open questions in the British Cabinets. The reason was that no difficulty was then felt in administering the Government under a system of open voting and of septennial Parliaments.

CHAPTER X.

THE RELATION OF MINISTERS TO THE OTHER SERVANTS OF THE CROWN.

§ 1. I have already stated that the members of the Cabinet are selected from the leading members of the parliamentary majority. I have assumed that these persons, when they have become servants of the Crown, still retain their seats in the Legislature. It may well seem superfluous to insist on this point. To us a seat in Parliament forms part of the connotation of the term minister. It is their parliamentary position, much more than their official rank, that forms in the public mind the distinctive characteristic of the high officers of state. No ministry could last for a day which was not fully and adequately represented in the great council of the nation. But we must not think that, because this practice is now established, it is necessary to parliamentary government. It is indeed essential to that form of parliamentary government which we possess. If the usage were otherwise, our political system would be something very different from what it is; and yet the authority of Parliament might not be diminished. In the reign of William the Third the absolute exclusion from the House of Commons of all servants of the Crown was one of the most popular reforms of the day. The Act of Settlement contained a clause,

Ministers must be in Parliament.

which, however, never came into operation, to effect this favourite object. A similar provision was inserted in the Constitution of the United States; and up to this day no officer of that Government has ever sat in Congress. But notwithstanding the abortive attempt at restriction to which I have referred, the presence in Parliament of servants of the Crown has always prevailed, and is now thoroughly settled. So imperative is this rule, that if a minister lose his seat in Parliament, constitutional practice requires* that, although he is not legally bound to do so, he should resign his office. It is an essential part of our political system that the heads of the great executive departments, those officers who direct these departments and determine their policy, should be present in Parliament. Their presence there is required to give due effect to the principle of parliamentary control. It is their duty to supply information and to answer objections: to bring forward, explain, and defend the measures of the Executive Government; to enable, in short, the King to describe his policy to Parliament, and to enable Parliament to tender suitable advice respecting that policy to the King. This parliamentary attendance is in effect the distinctive function of ministers. It is to their ability to conduct its business in Parliament that ministers owe the confidence of the Crown. It is from their position in the councils of the Crown that they obtain their influence in Parliament. Nor are the effects of this arrangement confined to the good understanding and facile communications between the different powers of the state. Their salutary influence has a wider range. It is, as Mr. Hallam has observed,† "one of the greatest safeguards of our liberty that eloquent and ambitious men, such as aspire to guide the councils of the

* Peel's *Memoirs*, ii. 51; Mr. Gladstone's *Gleanings*, i. 225.

† *Const. Hist.*, iii. 89.

Crown, are from habit and use so connected with the Houses of Parliament, and derive from them so much of their renown and influence, that they lie under no temptation, nor could without insanity be prevailed upon, to diminish the authority and privileges of that assembly." It is not a less important security that the very position which the zealous advocate of popular opinions seeks for the accomplishment of his views places him at the same time under the duty of maintaining in its integrity the prerogative. No English statesman, says Mr. Hallam, since the Revolution can be liable to the very slightest suspicion of an aim or even a wish to establish absolute monarchy on the ruins of the Constitution. No English statesman within the same period, it may be added, has ever desired to convert our constitutional monarchy into a republic.

§ 2. But there is another portion of the public service which is equally essential to the successful working of parliamentary government. The portion of that service which remains in office is for political purposes not less important than that which is liable to change. If all the officers employed in the civil service of the Crown were changed with every change of ministry, parliamentary government would soon become an intolerable nuisance. It would be impossible, with every department from the chief down to the messenger filled with raw recruits, to transact public business. The affairs of state have now increased to such an extent, and become so complicated, that for their prompt and efficient performance they require the undivided attention of men trained to the work and skilled in its execution. The Civil Service forms a special profession, and consequently requires for its members security of tenure. This

Non-political officers must be permanent.

principle has been on the whole steadily recognized throughout our political history. There has accordingly grown up a class of public officers whose position well merits attention. These officers are known as the permanent civil servants of the Crown. They hold office merely during pleasure; but custom, founded upon public convenience and supported by public opinion, requires that no officer shall be removed for any other cause than his personal demerits. They become, therefore, skilled in the business of their respective offices, and in the customary modes of its transaction. They are the depositaries of official traditions and the custodians of official records. It is to them that the minister must look for information, and it is to them that he must trust the execution of his designs. But these gentlemen are the servants of the Queen. It is their duty and their point of honour to give to their official superior true information, faithful advice, and loyal co-operation. It matters not to them who that superior may be, or how frequently he may be changed. Their position is the same. They are still the Queen's servants, and are bound to do the Queen's business under the orders of any officer that may in that behalf be honoured with Her Majesty's commands. Whatever may be their personal feelings or their political sympathies, all the servants of the Queen are in their official relations bound, whether individually or in concert with others, to promote to the utmost of their several powers the service to which they belong. Such is the theory of the Constitution, and it is not contradicted by the practice. Both divisions of the service faithfully observe their mutual relations. The heads of departments in all their fluctuations never abuse Her Majesty's confidence by advising the dismission of a meritorious officer on the sole ground of his political opinions. The subordinate officers are careful

to avoid such an expression of their political feelings as might bring them into collision with any of their chiefs for the time being; and honourably fulfil, without respect to persons, their duties towards their official superior. So well is the practice now understood that scarcely has a complaint been heard for many years; and the control of the vessel of the state passes from hand to hand, as the exigencies of political affairs require, with perfect ease and with no appreciable inconvenience. The commander may be often changed, and the direction of the good ship may be altered; but the crew remains the same, equally prompt to obey every varying order, and equally skilful to carry it into execution.

This system also possesses some important incidental advantages. It secures not only the efficiency but the cheapness and the good order of the public service. It both produces that special skill and that official aptitude which long practice and familiarity with the details of business only can give; and it renders the public servants content with a very moderate remuneration, and unwilling to leave their employment. No prudent man would give up his business or his prospects of business for a situation that might not last one year, and which would almost certainly not last five years. But many prudent men find, in the security of income and the prospects of a retiring allowance, in the comparative ease and in the respectability of the public service as it is now constituted, a sufficient compensation for its small pecuniary rewards. A superior class of men is thus induced to enter the service: and the longer each officer remains in the service, the more difficult it becomes for him to leave it. Dismission is a much more formidable penalty to the man who regards his office as the business of his life than to the man who holds it as a mere temporary occupation. The

discipline, therefore, is likely to be much better in the former case than in the latter. So far as motives of self-interest are concerned, a permanent officer is much less accessible to corrupt influences than one who has only a short time to make as much as he can out of his place, and who cannot be restrained by professional pride or any similar counteracting influence. But I am now concerned with the political rather than the economical results of the system. I have already said that by its means the requisite changes of power, as often as they may occur, are safely and easily effected. The system also possesses a negative advantage of hardly less importance. These political changes are effected without any very great amount of party feeling. It is true that political excitement sometimes runs high in England. But the most violent excitement of the kind is trivial in comparison with that which we should be obliged to undergo, if at every change of ministry it were influenced by the vested interests and by the hopes and fears of hundreds of thousands of men. Not merely would the actual holders of office—some forty thousand persons—be personally concerned in the contest ; but the whole vast body of candidates for office would hope to gain each something for himself in the general scramble. The Queen's service would then indeed become the spoils of office. But this calamity would be the least part of the evil. There would be established a great political lottery with forty thousand prizes of varying amount. With such a stimulus politics would soon become the business of a large part of the population : the people would be demoralized, and the public service would be ruined.

§ 3. The laws which now regulate the capacity or incapacity of officers of the Crown to serve in Parliament

did not originally contemplate the results which I have attempted to describe. The great aim of our legislation on this subject has been the limitation of Royal influence in Parliament. At Common Law there was no restriction upon the number of servants of the Crown who might have seats in the House of Commons. Official position did not constitute any disability or create any exemption. When, therefore, the House of Commons became of sufficient importance to attract attention to its elections, the Crown, partly by its general influence, partly by means of the prerogative which it then exercised of summoning representatives from new boroughs, was enabled to secure in that House a powerful influence. It is said that a large proportion of the members of the famous Reformation Parliament under Henry the Eighth were servants of the Crown. The same practice was followed during subsequent reigns, and was not discontinued after the Revolution. New offices were constantly created, and extravagant salaries were paid, for the sole object of maintaining the parliamentary influence of the Crown. A reform, therefore, was obviously required. The Whigs were disposed on principle to limit the prerogative, and the Tories were glad to embarrass the Government of the usurping Dutchman. On several occasions in the reign of William bills to secure the independence of Parliament were introduced in forms of varying stringency. None of these measures was successful. Their failures occurred with curious regularity in each of the branches of the Legislature respectively. The first bill on the subject was carried in the Commons, but was lost in the Lords.* The second bill, after undergoing an essential modification in the Lords, passed both

History of disqualifying legislation.

* Macaulay, *Hist. of Eng.*, iv. 342.

Houses ; but, to the great indignation of the Commons, failed to receive the Royal assent.* The third bill miscarried in the Commons.† In particular cases, however, when new offices were created by Act of Parliament, disabling clauses were inserted in the Act. Such was the case with a new Board of Revenue appointed in 1694 to manage the stamp duties, a case which appears to furnish the earliest instance of official disability.‡ This incapacity was subsequently extended to the Commissioners of Excise and some other officers in the same department. At length, when the Act of Settlement was under consideration, the Tory party succeeded in the introduction of a clause excluding, after the accession of the new dynasty, all placemen without exception from the House of Commons. The Lords, as I have already had occasion to observe, did not attempt at that time to make any alteration in the bill. They passed the measure without amendments, and so caught their opponents in their own snare. For the same reason the bill received in due course the Royal assent. But in 1705, long before the restrictive clause came into operation, circumstances occurred § which led to its reconsideration. These circumstances were as follow :—

Queen Anne could not be induced to permit her apparent successor or any member of the Hanoverian family to reside in England during her life. It therefore became necessary to make some provision for a Regency in the event of her decease. A Regency Bill was accordingly introduced, which, among other things, provided that the Parliament in existence, or which had last been in existence at the time of the Queen's death, should not be dissolved, or, as the case might be, should be revived, upon

* Macaulay, *Hist. of Eng.*, iv. 481.
† *Ib.*, 528.
‡ Hallam, *Const. Hist.*, iii. 191.
§ 6 *Parl. Hist.*, 474.

that event ; and should continue for six months, or until its dissolution by the new Sovereign. But this provision, of which the importance was obvious, was inconsistent with the clause of exclusion in the Act of Settlement. The whole question, therefore, was once more opened for discussion. The House of Commons enumerated a number of offices, the holders of which should be incapable of being elected ; and proposed that the acceptance by any member of any other office should vacate his seat, but should not create an incapacity. The Lords took advantage of the opportunity to revise the Act of Settlement. They proposed to repeal the clauses of that measure which related to the Privy Council and to the exclusion of officers from the House of Commons, and to limit the exclusion to the Commissioners of Prize Courts and to all offices of subsequent creation. The Commons refused to accept these amendments. At length, after several conferences between the Houses, a compromise was effected. The principles which were then established still form the basis of our law upon this subject. The acceptance by a member of the House of Commons of any office from the Crown, except a new* or higher commission in the naval or military services, vacates his seat. If the office were in existence on the 25th of October, 1705, the person accepting it (subject to the disabilities created by later Acts) is eligible for re-election. If the office be of later origin, the officer is during his tenure of office absolutely incapacitated. Where the appointment is made not directly by the Crown, but by some head of department—where, in other words, the office is held under the Crown, but not from the Crown—if the origin of the office be anterior to the 25th of October, 1705, as is the case with the offices of Secretary to the

* It has been decided that acceptance of a first commission in the army or navy vacates a seat.—2 *Hatsell*, 49, 52.

Treasury and to the Admiralty and some similar offices, the office is not within the meaning of the Act, and no vacancy upon its acceptance occurs. But if the office be of subsequent origin, the incapacity is created. Although precaution was thus taken against any increase of the evil, and although some few classes of officers were disqualified by special Acts, yet the number of ancient offices which were by law not incompatible with a seat in the House of Commons continued, even after the passing of this Act, to be very considerable.* In the first Parliament of George the First, which comprised about five hundred and fifty members, there sat two hundred and seventy-one servants or pensioners of the Crown. In the first Parliament of George the Second there were two hundred and fifty-seven. The reduction of this great influence was therefore an object hardly less dear to the Reformers of that day than a similar measure had been in the days of William and of Anne. Several bills for this purpose were introduced, but without success, until at length in the session after the fall of Walpole the Place Bill of 1743† became law. By this Act a great number of inferior officers were excluded from the House of Commons. Nearly forty years afterwards a further advance was made in the same direction. Edmund Burke's great scheme of Economical Reform was—in a mutilated form indeed, but still with some of its original brightness—adopted by the second Rockingham ministry, and carried successfully. By this measure several offices tenable with seats in Parliament were suppressed. The result of these various reductions was very marked. In 1821 there were but eighty-nine civil officials and pensioners sitting in the House of Commons. By the subsequent abolition and the consolidation of offices that number was

* May, *Const. Hist.*, i. 311; and see 2 *Lords' Protests*, 66.

† 15 *Geo. II.*, c. xv.

reduced in 1833 to sixty.* Since that time a few new political offices have been created ; but no material change has occurred, or seems likely to take place.

There is a peculiarity in our Constitution which, if the principle of exclusion affirmed by the Act of Settlement had been carried into effect, must have led to very serious consequences. Where both chambers of the legislature are elective, such a system of exclusion might be adopted, with great inconvenience indeed, but without such a constitutional derangement as that which we narrowly escaped. At the time of the Act of Settlement, Peers filled to a much greater extent than at present the high offices of state. But every Peer sits as of right in Parliament ; and no attempt has ever been made to apply the principle of exclusion to the hereditary chamber. The servants of the Crown would thus have continued to express in the House of Lords the opinions of the Government, while no such organ could find a place in the House of Commons. In these circumstances, the attempt to exclude ministers from the House of Commons could have had but one result. It would have transferred the business transacted in that House to the House of Lords. In the early part of the eighteenth century the Lords† were, as a body, greatly superior to the other House in general ability and political intelligence. Even in the reign of George the Third traces may be found of their influence. If, at the very time at which this influence was most marked, all direct communication between the Crown and the Commons were cut off, while, at the same time, the communication between the Crown and the House of Lords was unchanged, the whole business of the state must have been transacted in that assembly which exclusively presented facilities for the

* May, *Const. Hist.*, i. 311.

† See Buckle, *Hist. of Civ.*, i. 410.

purpose. All that the one House lost the other must have gained. The leading commoners would have regarded their position merely as a stepping-stone to the peerage, and the best abilities of the realm would have been drained from the elective to the hereditary Council. "On every great question—foreign, domestic, or colonial—the debates of the nobles would have been impatiently expected and eagerly devoured. The report of the proceedings of an assembly containing no person empowered to speak in the name of the Government, no person who had ever been in high political trust, would have been thrown aside with contempt. Even the control of the purse of the nation must have passed—not perhaps in form, but in substance—to that body in which would have been found every man who was qualified to bring forward a budget or explain an estimate. The country would have been governed by Peers, and the chief business of the Commons would have been to wrangle about bills for the enclosing of moors and the lighting of towns."*

History of political dismissions.

§ 4. I have already observed that during the last century the rules of ministerial discipline were much less exact than they now are. In like manner, although in a less degree, the present practice as to the permanent tenure of non-political officers was not always observed. On more than one occasion the misconduct of some subordinate officers or the violence of their superiors very nearly led to the establishment of dangerous precedents. During the reign of Queen Anne the Whig ministry complained bitterly of the impediments which they experienced from Tory officials. Lord Godolphin declared that there was not a Tory in any ministerial office

* Macaulay, *Hist. of Eng.*, iv. 341.

who did not require to be spoken to ten times over before he would execute anything that had been ordered, and then it was done with all the difficulty and slowness imaginable.* When the Tories were in power, and their triumph seemed to be secured by the momentary victory of Bolingbroke, it was their intention, as the baffled minister himself acknowledged,† to fill all the employments of the kingdom, down to the meanest, with their partisans. Sir Robert Walpole, when smarting under the defeat of his Excise Bill, not only dismissed civil officers with seats in Parliament whom we should now consider as bound to support the measures of their chief, but deprived of their commissions several officers in the army. Nor was this the only occasion on which the great Whig minister exercised for political reasons towards military members of Parliament the prerogative of dismission. Three or four years afterwards he tried, though very unsuccessfully, by this means to muzzle that "terrible cornet of horse," whose fiery eloquence was then beginning to fulmine over England. Walpole, indeed, asserted in Parliament that he should think any man a most pitiful minister who should be afraid of advising His Majesty to cashier an officer who habitually opposed the measures of Government.‡ He added that by his dismission of Lord Cobham and the Duke of Bolton he should leave it as a legacy to all future ministers that upon every occasion it is their duty to advise their master that such an officer is unfit to have any command in the army. This view of Walpole as to the similarity of civil and military officers so far as their political duties were concerned, although it is not countenanced by the Act of Queen Anne, was accepted both by George the Third and Mr.

* Russell's *Eng. Gov.*, 144 (1st ed.)

† Hallam, *Const. Hist.*, iii. 228, *note.*

‡ Coxe, *Memoirs of Sir R. Walpole*, ii. 251.

Grenville.* When the great question of general warrants was discussed in Parliament, Colonel Barrè and Colonel A'Court were deprived of their commands in consequence of their votes in the House of Commons: and a little afterwards by the King's express directions the same measure was adopted in the case of one of the principal Whig leaders, General Conway. But the public feeling on this subject has been so strong, and the impropriety of punishing a soldier for other than a soldier's offences so manifest, that this precedent has not been followed. No example, since the dismission of General Conway, has occurred of any military member of Parliament being required to support the Government.

A much more serious innovation, however, was attempted a few years before the affair of General Conway. We meet from time to time under the later administrations of George the Second and the earlier administrations of his grandson with complaints against what were termed proscriptions. Most of these acts were merely what we should now regard as ordinary political changes. But a true proscription occurred in 1763, under the auspices of Lord Bute and the elder Fox. Not merely were the chiefs of the opposite party subjected to unseemly and almost unprecedented affronts, but the rage of the victors did not spare the subordinates. Excisemen and tidewaiters were dismissed because they had been recommended by some member of Parliament who voted against the Government on the negotiations for peace. Several old servants of the Duke of Newcastle who had obtained subordinate places were hunted out and deprived of their bread. A Sussex yeoman who had been rewarded with an office for his bravery in a conflict with smugglers was dismissed because he was an

* *Grenville Papers*, ii. 234, 507.

adherent of the Duke of Grafton.* The widow of an admiral, who had for many years held in lieu of a pension an appointment of housekeeper at one of the public offices, lost her situation for no other reason than that she bore the name of Cavendish. But this bad precedent has been universally reprobated. The restoration of the proscribed was one of the first conditions for which the Rockingham ministry on their accession to office in 1765 stipulated. Charles Fox, a few years afterwards, was shocked and grieved at the mention of his father's cruelty. At the present day no minister could attempt such a course. The tendency is, perhaps, towards the opposite extreme. A German writer† has remarked with not unnatural surprise the fact that on one occasion the dismission of a letter-carrier led to the presentation to Parliament of 2,160 folio pages of evidence. Little has occurred during the present century in respect of this subject to require notice. Complaints have sometimes been made that some official has taken a prominent part in some contested election or other political proceeding, and an intimation has been given that a continuance in such conduct would induce the Government to advise Her Majesty to dispense with that officer's services. Such instances are infrequent, and merely serve to illustrate the principle which is involved.

That principle also receives illustration from two remarkable cases. In 1812 the Prince Regent had caused negotiations to be opened with Lords Grenville and Grey for the formation of a ministry. It was proposed that the officers of the Royal household should be considered as included within the new ministerial arrangement. Lord Moira, who acted for the Regent, refused to allow any such change. Lords Grenville and Grey contended that the

* Lord Stanhope, *Hist. of Eng.*, v. 23. † Fischel, *Brit. Const.*, 160.

change they proposed was essential as a public proof of the Royal confidence and support. On this issue the negotiations were broken off. Subsequently, however, these offices were usually treated as political; and in a minute of the Cabinet* in opposition to Sir Robert Peel's views on the Bedchamber question, it was admitted to be "reasonable that the great offices in the Court and the situations held in the household by members of Parliament should be included in the political arrangements made upon a change of administration." The other case to which I have referred was the extension by Sir Robert Peel of this principle to the offices held by the ladies in the Court of a Queen Regnant. Although when the question first arose in 1839 Lord Melbourne's ministry denied that such offices were political, the practice for which Sir Robert Peel contended was adopted in 1841, and has since that time been followed.† The Mistress of the Robes and the Ladies of the Bedchamber, when they are closely connected with the outgoing ministry, are regarded as holding political offices. But when Ladies of the Bedchamber belong to families not occupying any prominent political position, no objection is made by the new ministry to their continuance in office.

§ 5. These examples indicate the true principles upon which disqualifications arising from office depend. They are not penal measures towards individuals; and should be regarded not as conveying any slight or degradation, but as based upon sound public policy. Whatever may have been their origin, these disabilities cannot now be considered as securities against an overgrown prerogative. They are

Principle of official disqualifications.

* May, *Const. Hist.*, i. 130. † *Ib.*, 132.

not the props and appliances by which the weakness of parliamentary virtue is supported. They are not the safeguards against the ignorance or the imbecility of electors. All these reasons have indeed been urged in their defence, and some of them, if not all, were once true. But the reason for which a law was passed is not necessarily a reason for its continuance. In the present state of the Royal authority its influence is perhaps less than we should desire. With the present constitution of parliament, under the present conditions of publicity, and with the present increasing tendency in England to elect none but wealthy representatives, there is little danger that members will be directly bribed with places or by any other direct means. In the present state of public intelligence, and with the present means of forming and enlightening the public opinion, electors do not require protection against themselves. But under the existing system of Parliamentary control, enforced by ministerial changes and guarded by an official profession, with a fluctuating body of chiefs and a permanent body of subalterns, a seat in Parliament and a permanent official position are irreconcilable. It is a case of inconsistent offices. It would not conduce to official discipline if an officer were in the evening to denounce those instructions which during the morning he had been engaged in carrying into effect. Nor could any cordial co-operation be expected between a minister and the subaltern who the night before had been striving to drive him from his office. On the other hand, if friendly parliamentary relations existed between the minister and his subalterns, two other difficulties would arise. There would be the temptation to fill, and to keep filled, the public offices with men whose qualification was steady voting and not official aptitude ; and there would be the certainty that the qualities which were the highest merits

in the eyes of one minister would appear intolerable defects to his successor. Thus the number of officers liable to change would be unduly increased, and the efficiency of the service would be proportionately injured.

The servants of the Crown, then, form two great classes, the efficiency of each of which is essential to the public service. One of these classes is liable to removal from office for political reasons: the other is not thus liable. The test of the class to which any officer belongs is found in his possession or his non-possession of a seat in Parliament. If the number of the political class be unduly restricted, there is a deficiency in the proper means of communication between the Executive Government and the legislative chambers. If the number of that class be unduly increased, the efficiency of the public service is impaired, and the inconveniences incident to a change of ministry are aggravated. Any alteration in the proportions of the two classes thus produces evils differing in character according to the class in which the change has been made, but equally injurious to the public welfare.

We can thus estimate the real character of that provision of the Act of Anne which requires every member of the House of Commons who accepts a political office to vacate his seat. This provision, although it is really a mere accidental appendage of our political system, is popularly regarded as a sort of palladium of the Constitution. So rigidly was it enforced that until 1867 even a change of office involved a new election. If the Solicitor-General were promoted to the Attorney's place, or if the Chancellor of the Duchy of Lancaster accepted the seals of Secretary of State, he was compelled to go back to his constituents. Yet in no point of view can this practice be supported. Historically, it arose from a compromise, as we have seen, between the two great parties in the reign of Queen Anne;

and although it was then useful in procuring the settlement of an important question, its utility in that respect has ceased with the dispute. Considered as a question of principle, the reason of the restriction has completely ceased. The practice may once have been useful in checking the appointment by the Crown of an unpopular minister. But no minister can now retain office for a week in opposition to the wishes of the House of Commons. A much more efficient security is thus provided for the employment of ministers who possess the confidence of the nation than that which the requirement of a new election affords. In practice this rule is extremely inconvenient. In the unreformed Parliament, when there was a number of convenient members and secure seats either directly connected with the Government or dependent on persons connected with the ministry, the inconvenience was trifling. But since 1832 the full operation of the Act has been frequently felt. In any case the necessity for re-election involves a serious loss of time just when such a loss is most inconvenient, and no inconsiderable amount of needless trouble and inconvenience. But where opposition is offered to the re-election of the minister, another evil arises. One crossgrained or corrupt constituency may thus impede public business, and greatly embarrass a new administration.* Such a constituency practically obstructs the exercise of the prerogative in the selection of ministers. The Crown is often obliged to consider in making its appointments the candidate's chances of re-election more than his official aptitude. In 1835 Lord John Russell was for some weeks out of Parliament in consequence of a defeat on his acceptance of office. In 1845, when Sir Robert Peel was bringing forward his great measure of

* See Greg's *Essays*, ii. 406, 552.

Commercial Reform and some changes in his ministry took place, three of his principal colleagues were unable to regain their seats. On many occasions combinations of great political importance have been prevented from the uncertainty of the new elections. Yet, although this supposed check often impedes political combinations, it cannot restrain them when they are actually made. No ministry has been compelled to resign in consequence of its re-elections. The utmost effect of "the return to the constituencies" is a mere embarrassment. Ministers who have even a chance of being able to govern the country will never want for any length of time seats in Parliament. Lord John Russell in his Reform Bill of 1854 proposed to repeal this provision in the Statute of Anne; but his bill failed, and the rule continued until it was modified as to the acceptance of a different office in the same administration by the Reform Act* of 1867.

Official superiority of ministers.

§ 6. In the relations between the political and the non-political servants of the Crown, it is a fundamental rule that all non-political officers who hold office during pleasure must be subordinate to some responsible minister. This rule arises from the very nature of our political system. The ministers who are responsible to Parliament are the heads of the great departments of the state; and their responsibility relates to the proper administration of these departments. They therefore are by their official position entitled, and by the theory of the Constitution are required, to direct the policy of the departments over which they severally preside. For that policy they are answerable, at the peril of censure and consequent loss of office, to Parliament. But no such

* 30 and 31 Vict., c. 102, s. 52. See *Acts of the Parliament of Victoria*, No. 780, s. 4.

responsibility rests with non-political officers. They have merely to execute with fidelity the instructions of their chief. When they have with due diligence performed all his lawful commands, their obligations are at an end. For the prudence of these commands that chief is alone answerable. Thus the responsibility of ministers extends both above them and below. It shelters not only the Crown but also the inferior officials. If any exercise of the prerogative be imprudent, it is the minister only who is blamed. If anything within the bounds of law go wrong in a public department, it is a sufficient answer for the non-political officers that the direction was given by the minister. It may indeed happen that the minister is unacquainted with the business of his office, and that the under-secretary or other permanent officer is thoroughly versed in his work. Still, although the experience and skill of the permanent officer must always be at the service of his chief, the assistant can have at most merely a consultative voice. The mode in which the control of Parliament over the Executive Government is exercised consists in the direction of the great public departments being placed in the hands of some person responsible to Parliament for their administration. If, therefore, a permanent officer were to have the decisive authority in any department, either that officer must be liable to parliamentary criticism and to change,—that is must cease to be permanent, and become political ;—or else the control of Parliament over that department must be abandoned. The two positions, administration by an officer whose tenure is permanent, and the exercise of a prompt and effectual control by Parliament, are inconsistent. Undoubtedly the system of double command, and the official superiority of one who sometimes is both in professional skill and in general ability inferior to his subaltern, are an inconvenience. But

it is the price, and practically the moderate price, that we pay for Parliamentary Government.

From a want of appreciation of its real nature attempts have sometimes been made, but always without success, to avoid this rule of the official superiority of the political servants. One example of this kind is the command * of the army. It has been maintained that the control of the army is part of the prerogative ; that the pleasure of the Crown should be taken on all military matters by the Commander-in-Chief alone, and that the ministry of the day is not entitled to interfere in any way with this branch of the public service. In accordance with these views the late Duke of Wellington urged the Prince Consort to accept the command of the army either immediately or as the Duke's successor. Fortunately, however, the Prince, with a rare perception both of his own position and of the principles as they are now developed of our Constitution, declined † the proposal. There is, indeed, no difference in this respect between the army and any other part of the public service. Both the civil and the military administration belong exclusively to the Crown. With neither of them does Parliament directly interfere. But in respect to both of them Parliament may and ought to advise the King. There must, therefore, be in Parliament ministers to represent the views of the Crown on both these services, and through whose responsibility the control of Parliament is exercised ; and these ministers who bear the responsibility must, consequently, have the power of decision. But the Commander-in-Chief could not without great detriment to the public service be a political officer. In times of emergency, those very times in which Parliament would most desire information, he probably could not attend in

* See, for the history of this matter, Sir G. C. Lewis's *Letters*, 394.

† *Life of the Prince Consort*, ii. 252, *et seq.*

his place at all: and military ability, like ability in any other profession, cannot always be secured in every political combination. The Commander-in-Chief must, therefore, be a permanent officer; and, if permanent, then necessarily subordinate. His position would indeed be unsafe, if he could not depend upon the support of ministers in case his measures were questioned in Parliament. But this support ministers cannot be expected to give * unless the officer who trusts to it communicate with them in the performance of his duties in such a manner as to enable them to guard against his taking or omitting to take any step for which they will not be prepared to defend him. It seems accordingly to be now settled that the department of the Commander-in-Chief,† (or, as the style of the present officer is, the Field-Marshal Commanding-in-Chief,) is a sub-department of the department of the Secretary of State for War. The latter functionary, however, does not usually interfere with the ordinary and regulated course of military promotions or with the general management of the army; and the Horse Guards thus has the appearance of forming an independent department.

Another and a still more conspicuous illustration of this principle is found in the case of public boards. Partly from a desire, like that which was probably felt in the case of the army, to separate from the disturbing influences of political changes the business of a great department, and partly perhaps from a desire to control the overgrown authority of a single officer, the administration of some departments has been placed in commission. Sometimes the Board of Commissioners consists wholly of political officers; sometimes its members are partly political and partly non-political. In either case, however, the result is precisely

* Earl Grey's *Parl. Gov.*, 10, *note*.

† Cox's *Institutions of the Eng. Gov.*, 174.

the same. The minister who presides at the board engrosses the whole authority. The other members may consult with him, but his voice is decisive. It could not, indeed, be expected that any minister would submit to be out-voted by his own subalterns. Either they must withdraw their opposition, or he must advise their removal. Thus the members of the Treasury Board include the highest and the lowest of the political functionaries.* At its head are the Premier and the Chancellor of the Exchequer. But these great officers never attend any ordinary meetings of the board. Such meetings are merely formal, and are held by the junior lords, whose real duties are said to be "to make a House, to keep a House, and to cheer the minister." A similar practice prevails in the Board of Trade and in the Admiralty.† In the latter department six commissioners, apparently with equal powers and of equal rank, are appointed to perform the duties of the office of Lord High Admiral. Any two of these commissioners may act. But the authority of the First Lord is undisputed. The other lords have a sort of inferior jurisdiction, and preside over the several branches into which the department is divided; but they never think of differing from their chief or of refusing to register his edicts.

I may, perhaps, mention another example which shows how constant is the operation of these principles. In Victoria, as in every new country, the administration of the Crown lands and the construction of public works are matters of the most urgent importance. Very soon after the introduction into that colony of Parliamentary Government, an Act of the Parliament of Victoria‡ was passed, the preamble of which set forth that the duties of the

* Cox's *Institutions of the Eng. Gov.*, 697. † *Ib.*, 656, 722.
‡ No. 31.

offices of Commissioner of Crown Lands and Survey and of Commissioners of Public Works could be more effectually and economically performed if they were consolidated and placed under one head. With this object the Act proceeded to establish a Board of Land and Works, of which the president was expressly made a political officer and the other members were made non-political. Large powers are given to the board, and its members are required, before entering upon their duties, to make a solemn declaration that they will faithfully impartially and truly execute their office. Subsequently two vice-presidents—both of them political officers—were added. The result has been that the board has practically become again divided into separate departments, and that its non-political members form a board of advice to the political chiefs of these departments. The president or one of the vice-presidents presides, according as the business relates to Crown lands or to public works or to roads and railways ; but he does not consider himself bound by the advice he receives, and the other members of the board feel that they have no power to act in opposition to the wishes of the minister.*

* *Victoria Civil Service Commission Suppl. Rep.*, 3, 4.

CHAPTER XI.

THE COUNCILS OF THE CROWN.

Ambiguities of *Curia Regis.*

§ 1. For the better discharge of his Royal duties, the maintenance of his dignity, and the exertion of his prerogative, the Law, as Lord Coke* informs us, has armed the King with divers councils. These councils are the *Commune Concilium*,† or High Court of Parliament; the *Magnum Concilium*, or the Peers of the Realm; the Privy Council for matters of state; and the King's Council for matters of law—that is (says Lord Coke) his Judges. Sir Matthew Hale‡ also enumerates four principal councils of the Crown, but with a slight difference. He agrees with Lord Coke as to the *Commune Concilium* and the *Magnum Concilium;* but he omits the council for matters of law, and distinguishes between the *Concilium Privatum et Assiduum* and the *Concilium Ordinarium.* According to this view the Privy Council stood to the Ordinary Council in a somewhat similar relation to that in which the Great Council stood to the Common Council. It had for some purposes independent authority; but it was merged in, and formed part of, the greater body when that body was in session. We must, however, bear in

* *Co. Litt.*, 110*a*; 2 Steph. *Commen.*, 477.

† This meaning of *Commune Concilium* is not always observed. 1 *Lords' Report*, 174.

‡ *Jurisdiction of the Lords' House*, 5.

mind that these illustrious writers were describing a comparatively late period of our institutions, and that a proposition which is good law may yet be historically inaccurate. Questions *de vero* and *de jure** do not always coincide. The four courts at Westminster are held in law to be coeval; but this maxim, although convenient for lawyers, is not accepted by historians.† The existence of a number of councils in the sixteenth or the seventeeth century does not prove their existence, at least in the same form, during the twelfth or the thirteenth century. Such a multiplication of separate but related bodies marks a late and not an early period of national growth. From the earliest times, however, of our history two consultative bodies may be discerned in attendance upon the Crown.‡ We shall see that each of these bodies passed through various stages and gave rise to separate institutions.

Much of the obscurity which involves this portion of our history arises not only from the scanty materials that we possess, but in a still greater degree from the confusion of names in those materials. The same term is frequently applied to different institutions. With that want of precision which sometimes attends familiarity with their subject, the old documents often fail to distinguish between two bodies which have a common name. Another cause of confusion is that process of specialization by which a name once simple and comprehensive is used to express some particular part of the whole after the separation of the parts has taken place. In this case by a sort of reaction a further complication is produced. Words that at a later period acquire a definite meaning mislead us when they are used by older writers to express ideas very different from those which they now denote. Sometimes, too, the same institu-

* Sir M. Hale, *uti supra*, 198. † Madox, *Hist. of the Exch.*, i. 773.
‡ 1 Spence's *Eq. Jur.*, 71.

tion performs different functions, and in each case under a different name. The same body may meet for different purposes, and in each capacity may be distinguished by a special appellation ; but we shall be in error if we assume in such circumstances a difference in fact. The institution under all the variety of its functions remains the same, a single form of many names.

Most of these propositions will receive illustration in the following pages. There are two expressions, however, to which at the outset of our inquiry attention must be directed. Without, indeed, a constant recollection of their ambiguities, our old records present frequent and perplexing embarrassments. No expression is more frequent in our early history than the King's Court, the *Curia Regis*, or the *Aula Regia*, for all these synonyms occur. This expression is used in at least three different senses.* What is true therefore of the *Curia Regis* in one sense, is not true of it in another sense. The expression means sometimes the whole assembly of the military tenants of the Crown. It means sometimes the smaller and more confidential assembly that continually attended upon and advised the King. It means sometimes the Court of Justice, to which a great part of the judicial business of the first-mentioned council was ultimately transferred. If with proper caution we use modern terms, we may say that the expression *Curia Regis* is used to express Parliament, the Privy Council, and the Court of King's Bench.

Another term, the use of which in early times is likely to mislead, is Parliament. With us this familiar word denotes the supreme council of the kingdom, the organ of legislation, the guardian of the public purse, and the controller of every part of the administration. But this

* Hallam, *Middle Ages*, ii. 423.

was not always its meaning, nor was the name exclusively reserved for the Common Council of the realm. It originally meant any assembly held for the purposes of conference. It is said* to occur for the first time in the chronicle of John of Brompton, in the first year of Richard the First. In a writ directed to the Sheriff of Northamptonshire, in the twenty-eighth year of Henry the Third, the first authentic public document in which the word is found, the famous meeting at Runingmede is called *Parliamentum*.† Mathew Paris describes "a most general Parliament of all the magnates of the realm" in 1246. It is remarkable that this writer uses the word several times in his account of the year 1246 and 1247, but in no other years before or after. In the latter part of the reign of Henry the Third the word seems to have been in frequent use, and occurs in several authentic documents. The *Curia Regis* sitting for whatever purpose seems to have been at this period distinguished by the appellation of the King's Parliament rather than by its former name.‡ In the reign of Edward the First the word is used in the preambles of several statutes, but the name seems during that reign to have been generally applied to the remaining jurisdiction of the King in his great court and council after the separation of the courts of law. In the early part of the following reign the word began to acquire its more definite meaning of a legislative assembly, and this change was completely effected about the reign of Henry the Fourth. At this time the words "authority of Parliament" were generally used to express a legislative authority. The original sense of the word Parliament, as applied properly to the King's ordinary council and Supreme Court of Justice of original jurisdiction, seems to have then been in a great degree lost:

* Parry's *Parliaments*, 33, *note*. † 1 *Lords' Report*, 461.
‡ 1 *Lords' Report*, 21.

and the word was generally used in the same sense in which it is now generally used, as applicable to the legislature generally, or to the assembly of the two Houses in Parliament, without adverting to its ancient sense.*

§ 2. The first of these councils which attended upon the Crown was that great assembly of prelates and nobles, known before the conquest as the *Witena Gemote* and after that event as the *Curia Regis*, with which the King deliberated on all matters of public interest. This assembly met not only for purposes of state or of legislation, but for the administration of justice. According to the usual obligations of tenure† the immediate free tenants of any superior lord were bound to attend the court of that superior. The King's immediate tenants, therefore, other than those in Ancient Demesne, whose attendance was due only at the court of the particular manor of which they held, were bound to attend his court. There it was their duty both to assist in the Royal deliberations, and to administer to their peers, or themselves to receive from them, justice in such controversies as might arise. The courts might be convened at the King's pleasure, but were usually held at the three great festivals of the year. When the Conqueror was in England, he usually held his court at Easter in Winchester, at Whitsuntide in Westminster, and at Christmas in Gloucester. On these occasions, as the old chronicler tells us, King William wore his crown; and there were then present with him there Archbishops, Bishops, Abbots, Earls, and Barons of all England. These meetings seem to have been held partly for festive purposes, partly for such purposes as a modern *levée* is supposed to serve, partly for the transaction

The Great Council.

* 1 *Lords' Report*, 361. † See 1 *Lords' Report*, 26.

of business.* It was apparently with the advice of this body, whether at one of its meetings *de more* or not, that the obligations of the military tenures were determined.† It was probably at its request that William, after he had inquired into the customs of his new realm, abandoned his intention of enforcing the Danish law, and left to his English subjects their hereditary usages. The King sought its advice on all matters of public interest, and frequently in his domestic concerns. In it he received appeals from inferior tribunals, and exercised in certain cases an original jurisdiction both civil and criminal. In this court the servants of the Crown were punishable for their misconduct; and it was in this court that the military tenants of the Crown were accused of treason or of imperfect performance of their feudal services. During the civil wars in the reign of Stephen these customary meetings of the Great Council were interrupted,‡ and were never, at least in their original form, thoroughly revived. New organs were gradually formed for the performance of its various functions. Some attempts, however, were made to stand upon the old ways. In the Provisions of Oxford§ it was enacted that Parliaments, as they were then called, should be held three times every year. In the early part of his reign Edward the First seems to have designed the restoration of the Norman practice, and held at stated periods four Parliaments in every year. "These ordinary Parliaments," says a high authority,‖ "were not, as such, legislative assemblies, but rather the King's great court, in which subjects applied for relief against their fellow-subjects, sometimes as to a court of original and sometimes as to a court of appellate jurisdiction: and the King's officers sued the subject on behalf of

* *Ed. Rev.*, xxvi. 351, and the authorities there cited.
† *Ib.*, 352.
‡ *Ib.*, 364.
§ 1 *Lords' Report*, 169.
‖ 1 *Lords' Report*, 170.

the King, and the subject petitioned the King both in matters of right, and in matters of grace and favour." It was during the session of one of these Parliaments that after the 23rd year of Edward the First the Legislative Assembly of the realm was summoned to meet the King. The duty of attending this court was evidently burthensome; and it is not improbable that the principal attendants were the persons in whose vicinity the court was held.* This distribution of the burthen may have been one reason for selecting different places for its usual meetings. When a grant of money was sought, a more than ordinary notice seems to have been required; and it is probable that the main distinction between the Common Council and the Great Council was the greater care shown in summoning the members when pecuniary grants were involved.

§ 3. I shall in a subsequent chapter attempt to trace the development of the *Magnum* or *Commune Concilium* in its legislative character. For the present I shall only notice a part of its development in matters of judicature. Its principal business was originally judicial. In the earlier stage of our social development neither statutes nor taxes were required. There was then little room for legislation. The King was expected to "live of his own;" and the good customs of the land were sufficient for the simple duties both of King and of subjects. But there was abundance of judicial business which required attention; and it was the interest of the King, as well as his duty and desire, to extend his jurisdiction and to promote the better administration of justice. The genius and the spirit of the Saxon law were unfavourable to the multiplication of business before the Supreme Court

Courts descended from Great Council.

* 1 *Lords' Report*, 450.

of the King.* Justice was administered between private parties in the County and Hundred Courts, and in the Courts of Hlafords possessing jurisdiction. If a hlaford denied justice and maintained his men in their iniquities, an appeal lay to the King; but if the case was brought before the King in the first instance, the plaintiff incurred a fine. No man was permitted to seek justice from the King till he had failed in obtaining it at home. No man was to apply for justice to the King till he had been denied justice in his hundred. The same tribunals and the same mode of administering justice were maintained after the conquest. County and Hundred Courts for trying questions of right continued to be held under the Conqueror and his sons. The laws of those Kings, like those of their predecessors, expressly prohibited the bringing causes in the first instance into the King's Court.

The rude and unskilful proceedings of the Saxon courts were not suited to the natural progress of society or to the better knowledge and more advanced civilization of the Norman settlers. A privilege was established of removing, on payment of a fine, cases from the local courts into the *Curia Regis*. The advantages of a less partial and more skilful administration of justice were so well appreciated that the business of the latter court seems to have rapidly increased. Even in the reign of Henry the First traces of the change that was in progress may be observed. It appears that before the 31st year of that King † *itinera*, or circuits, for the purpose of bringing the authority of the *Curia Regis* within the reach of all parts of the country, were in force. In the same reign, too, the Justices begin to appear as a separate order. The *justiciarii* were henceforth regularly included among the persons to whom charters

* *Ed. Rec.*, xxxv. 10. † Foss's *Judges*, i. 92.

were addressed, although the title is never so used in the charters of William the First and very seldom in those of William the Second.* Several reforms which strengthened this tendency were effected in the reign of Henry the Second. The circuits were revised and improved. The Assize of Novel Disseisin, or the substitution of a judicial inquiry before the King's Court for trial by combat, was granted in disputed titles to land. But a further and more momentous change then occurred, although our knowledge of it depends upon the casual notice of a solitary annalist, and even the year in which it was effected is uncertain.

Henry the Second, probably in the year 1176,† by the advice of the wise men of his realm, reduced the number of Justices in the *Curia Regis* from eighteen to five; and ordered that they should hear and determine all writs of the kingdom, not leaving the King's Court but remaining there for that purpose; so that if any question should arise which they could not settle, it should be referred to the King himself and be decided as it might please him and the wisest men of the realm. Several points in this passage deserve attention. In the first place the New Court was established by an Act of the Great Council. In the second place the authority which it exercised was the authority‡ which the Great Council had previously been used to exercise. Thirdly, an appeal lay from the New Court to the Great Council. Again, this court was to hear and determine all the writs of the kingdom. The limits of its jurisdiction were therefore defined by the Original Writs. The Original Writ was in the form of a precept or mandate from the King under the Great Seal addressed to the Sheriff of the county in which the cause of action arose or

* Foss's *Judges*, i. 90.

† See Hallam, *Middle Ages*, ii. 421; Stubbs, *Documents*, 125.

‡ See Hale's *Hist. of Common Law*, 147; Foss's *Judges*, ii. 170.

the defendant resided, commanding him to cause the party complained of to appear in the King's Court at a certain day to answer the complaint. Every writ was framed on some principle of law which gave the right on which the action was founded. A register of these writs was kept in the Chancery, and formed one main foundation of the Common Law in civil cases. For some time, however, the Great Council seems to have retained a jurisdiction partly controlling and partly concurrent. The former became merged in the Appellate Jurisdiction, of which I shall presently treat. The latter was discontinued at an early period. In the eighteenth year of Edward the First, by an order made in Parliament "in regard to the people who came to the King's Parliament are often delayed and disturbed to the great grievance of themselves and of the Court by the multitude of petitions exhibited before the King of which most could be despatched by the Chancellor and Justices," it is provided that such petitions shall come first to the Chancellor or Judges, who, if they cannot despatch the petitions, are to bring them to the King and his council. This order, although the House of Lords contended * that it was merely temporary, and not a permanent renunciation of its jurisdiction, both shows that the authority of the court was derived from that of the Great Council, and indicates the mode in which the original jurisdiction of that council was lost by desuetude.

This court thus established marks the origin of our present judicial system. It was to this permanent and fixed tribunal that the name *banc*um or bench, a term unknown to the Norman Kings,† was given. After its creation the name Justicer seems to have been completely separated from its old synonym, Baron. Although non-

* 6 *State Trials*, 740. † Madox, *Hist. Ex.*, i. 787.

professional persons for some time continued to sit in the King's Court, yet in the next generation the professional Judges greatly exceeded the others in numbers. The earliest known instance in which mention is made of Justices "*in banco residentibus*," occurs in Glanville,* and of Justices "*de banco*" in a record of the second year of King John.† The latest date at which the terms Justicer and Baron are used indiscriminately seems to be the sixth year of Richard the First.‡ Prior to the accession of the Plantagenets all the Judges belonged to the Baronial order. Under Henry the Second and his sons there were in all thirty-six professional Justicers and seventy Barons. Under Henry the Third the Barons were only eleven, and the professional Judges amounted to eighty-nine.§ The Bench of Henry the Second seems to have been a single homogeneous body. In the reign of John a differentiation became apparent. In order to remedy the inconvenience arising from the restless habits of John, who changed his Court in some years twelve times and in one year (the eleventh of his reign) had sat in twenty-four different places, the seventeenth section of John's Charter provided that Common Pleas should not follow the King, but should be held in some place certain. This provision was retained in the subsequent charters, and the place was understood to be Westminster. The rest of the *Curia Regis* continued to attend the King. In the *Articuli Super Chartas* of Edward the First,¶ it is provided that "the King will that the Chancellor and Justices of his Bench shall follow him, so that he may have at all times near unto him some sages of the law which may be able duly to order all such matters as shall come unto the Court at all times when need shall require."

* Foss's *Judges*, ii. 166. † *Ib.*, 170. ‡ *Ib.*, i. 334.
§ *Ib.*, iii. 3. ‖ *Ib.*, ii. 4. ¶ 28 Edw. I. St. iii. c. 5.

Thus the Bench was divided into two parts: one stationary, the other following the Royal person. The latter retained the original name, and was styled *Bancum Nostrum* or *Bancum Regis*. The former, which was as it were the offshoot, was known as the *Bancum Commune*. But the difference between them was for some time by no means clearly marked. In the reign of Henry the Third common pleas were brought before the *Curia Regis*, and pleas of the Crown were sometimes heard before the Justices of the Bench. Even so late as the thirty-fifth year of the same King the distinction was not complete.* Towards the close, however, of that reign, about two centuries after the conquest, and nearly one century after that event which I have described as the establishment of the Bench, the two Benches distinctly assumed their present form. The *Curia Regis* had hitherto under all its forms been under the presidency of the Chief Justiciar of England. This officer was in effect a Viceroy.† In the King's absence he exercised all the powers of royalty. When the King was in England, he was his principal and most confidential attendant. The less frequent absences of the King, after the great continental dominions of the Plantagenets had been reduced, may have removed the chief occasion for the services of the Viceroy. The concentration of such and so varied powers in a single office may during the troubles that marked the middle of the thirteenth century have been found inconvenient. It is certain that from the end of the reign of Henry the Third the office fell into abeyance. The transition from the Baronial Viceroy to the professional Chief Justices of modern times dates from the year 1268. The first of this honoured line bore the noble name of De Bruce. He can scarcely be regarded as

* Foss's *Judges*, ii. 178. † Madox's *Hist. Ex.*, i. 31.

one of the sages of the law, but both in title and in salary there was a marked difference between him and his immediate predecessors. De Bruce was styled not "*Capitalis Justitiarius Angliæ*," but "*Capitalis Justitiarius ad placita coram nobis tenenda.*" What was more significant, his salary was but one hundred marks, while that of the Chief Justiciar had been * a thousand. In the following year we find Gilbert de Preston presiding in the Common Pleas, with the same salary as De Bruce: and on his re-appointment on the accession of Edward the First De Preston is styled Chief Justice of the Common Pleas.† From that time the two courts became distinctly separated as well from each other as from the other parts of Government. In the reign of Edward the Third the Court of King's Bench became, like the Common Pleas, stationary ;‡ and the organization of our judicial system was complete.

Such seems to me to have been the origin of our Common Law Courts as they existed prior to the passing of the Judicature Acts. They sprang from the *Magnum Concilium*, the Great National Assembly of England, of which they exercised the authority and by which their judgments were revised. They were established with the concurrence of that body, and as a single tribunal. For that tribunal and for its members distinctive appellations, the Bench and Justices of the Bench, came into use. The single tribunal of the Bench, by the same authority as that which created it, was subsequently divided, for the better despatch of business, into two parts. These Benches exercised the original jurisdiction of the Great Council. The limits of that jurisdiction were defined by the Original Writs. Whatever jurisdiction the King's Court exercised, as expressed in these writs, was exercised by the two

* Foss's *Judges*, ii. 155. † *Ib.*, iii. 142. ‡ 1 Spence, *Eq. Jur.*, 340.

Benches, and was on a writ of error reviewed in the Great Court itself, or, as we now term it, the House of Lords. The system of jurisprudence thus administered was the Common Law, the law which concerned all the freemen of England, and was founded upon their free customs; but it did not notice or provide for any cases not directly affecting these persons or connected only with the peculiar and separate interests or powers of the Crown.

§ 4. The Second Council which in early times was in attendance on the King is known by several designations. It is variously called the Ordinary, the Continual, and the Secret or Privy Council. The first of these names seems to have been the most in use under our earlier Kings: the last is said to have become its usual appellation about the reign of Henry the Sixth. Whatever may have been its designation or its developments, the original principle of this Council seems to have been sufficiently simple. It was the body of confidential advisers who were in constant attendance upon the King and assisted him in the performance of his daily business. Such a body must be formed almost from the necessity of the case; but a precedent, if it were needed, might be found in the Consistorium of Imperial Rome. This council would naturally be formed of the principal servants of the Crown, and, if any further assistance were required, of such persons of rank and influence as might in a peculiar degree possess the Royal confidence and be honoured with the Royal commands. It might further be expected that the persons thus related to the Crown would either be members of the Great Council; or, if such were not the case, that the King, when he met the magnates of his realm, would require the attendance of his confidential servants to communicate to the Great Council proper information and

The Ordinary Council.

to assist it with the results of their experience. We find, accordingly, that the Privy Council was composed of the great officers and ministers of state, the great officers of the Household, and the Judges, Barons of the Exchequer, Justices itinerant, King's Sergeant and Attorney-General, and other law officers of the Crown.* When all these officers were called together, the assembly was described as a full council. When the business was of a special nature, those members only who were familiar with that particular kind of business were summoned. It further appears that this council attended upon the Great Council, but that those members of it who did not happen to be also members of the Great Council were merely assistants of that body.† The form of the writ to the members of the Privy Council was different from that to the Lords of Parliament; the place which they occupied in the House was different; and their power was consultative only, and not decisive. The Judges and the Masters in Chancery still attend upon the House of Lords either to give information on questions of law or occasionally to assist in ceremonials.

The functions of this council seem to have been co-extensive with the functions of the Crown. Its consent appears to have been deemed necessary to every important act of the King in the exercise of his legislative as well as of his executive powers.‡ By its advice the legislature was and still is convened. By its advice the Royal assent was in earlier times given to or withheld from the proposals of Parliament. With its assistance exclusively the King dealt with those cases, whatever might be their nature, that were supposed to belong to the prerogative only, and not to concern those persons who owed suit and service in the

* Hale's *Jurisd. of Lords' House*, 5. † *Ib.*, 12.
‡ 1 *Lords' Report*, 452; Hallam's *Middle Ages*, iii. 142.

Great Council or to form the subject of their deliberations. "The Council," it has been observed* in reference to the time of Edward the First, "was evidently then considered as a very important part of the Government, responsible to the King and the country for the acts done under its sanction; and the people often took great interest in its proper formation, of which there are striking instances in the reigns of Henry the Third and of Edward the Second."

In a record of Edward the Second,† Walter of Norwich, an old and meritorious servant of the Crown, on retiring from the active duties of public life is, amongst other marks of Royal favour, appointed to attend the King's councils "as well secret as otherwise." The distinction thus drawn seems to indicate the point at which the functions of the council begin to diverge. The great Lords who advised the Crown on its general policy neither needed nor desired the opinions of the judges and other officials on matters of state: nor could they have wished, except in some rare instances, to be troubled with the laborious business of judicature or of official routine. The business of the council thus spontaneously divided itself into two parts, into that which was confidential and was transacted privately, and into that which was public and was transacted with more or less of publicity. The former class, that pertaining to matters of state, belongs to the Privy Council, properly so called. The latter class gave rise to the several institutions of which I shall presently treat.

The administrative history of the Privy Council may for our present purpose be briefly told. It was, as I have said, the constant council of the King in all weighty matters of state. Without its advice no resolution of the Crown, whether as to foreign alliances or the issue of orders or of

* 1 *Lords' Report*, 451. † Madox, *Hist. Ex.*, ii. 59.

proclamations at home or other public acts, was finally adopted. It was in fact a board for the management of the general administrative Government. In a body so constituted the increase of public business was sure to produce a change. By degrees differentiations began to appear. What the Chancellor was in the judicial department, the Secretary of State was in the administrative department. Originally merely officers of the council, they became leading members of it, and ultimately attracted to themselves in their respective branches a great part of its authority. The Chancellor seems to have acted in early times as the King's private secretary. When his judicial duties began to increase, he was relieved by the appointment of a secretary under that title. About the accession of Henry the Eighth, the King's Secretary had become an officer of great consideration. In an act of the thirty-first year of that reign which regulates precedence among persons holding various great offices, the King's Chief Secretary is included, but is ranked last. Through the hands of this officer the diplomatic correspondence naturally passed.* After the peace of Westphalia, in 1648, it became the practice of European Kings, instead of sending embassies upon special occasions, to keep resident ambassadors at foreign courts. A great increase in the foreign correspondence naturally followed this change, and the importance of the Secretary increased with it. The attempt which Lord Clarendon made about the same period for a systematic division of the Privy Council into committees for the despatch of business, and to which I have previously referred, shows that the inconvenience of such a body as the council for the transaction of business was then felt. Several attempts were made to revive the former system, but the opposite tendency was

* See Cox's *Inst. of Eng. Govt.*, 662.

too strong. The number of the secretaries increased; the business of the council was distributed among them and the other departments; and the duty of general superintendence was performed by a special committee of the Privy Council known as the Cabinet. I have already endeavoured to trace the history of this institution. It now, therefore, only remains to consider the history of the judicial powers that belonged to the council.

§ 5. The King's Council had various functions and transacted its business in various departments. There were several chambers of council in the palace at Westminster. We read of the Chamber of the Chequered Cloth, the Chamber of the Green Cloth,* the Starred Chamber, the Painted Chamber, the White Chamber, the Chancery, Markolf's Chamber (so called from the legend depictured on its walls of the tests applied to the wisdom of Solomon by a Syrian peasant),† and other similar apartments. These various chambers, several of which are noticed in an Act of Parliament of the reign of Edward the Third,‡ served to mark the distinction between the different functions of the council. That body sat in a particular chamber for the transaction of particular business. Two of these divisions, the Exchequer and the Chancery, were from the first more distinctly marked than the rest. They were indeed regularly organized departments, with their appropriate staff, and offices in which the council used sometimes to meet. The Exchequer had charge of the Royal lands and revenues; and in cases connected therewith, the council, sitting in the Exchequer, and forming the Royal Chamber of Accounts, exercised a summary jurisdiction. At this meeting

Courts descended from Ordinary Council.

* 4 *Inst.*, 131. † Palgrave, *Essay on the King's Council*, 38.
‡ 31 Edw. III. St. i. c. 12.

of council, as at other such meetings, the Chief Justiciar, the highest functionary of the realm, originally presided. The Chancellor also frequently attended in the Exchequer, kept his Great Seal there, and transacted in it such business as concerned him. But gradually with the increase of business the separation of functions began. About the time of Richard the First, probably in the beginning as an accidental result of certain official changes, the attendance of the Chancellor was discontinued; and distinct Rolls were made up in Chancery and certified into the Exchequer.* In the thirty-fourth year of Henry the Third, the then Chief Justiciar De Segrave was dismissed; no successor for some time was appointed; but a new office, that of Chancellor of the Exchequer, seems to have been created, and persons apparently of special qualifications were appointed to discharge the duties of Barons.† The style of the Exchequer was subsequently altered from the Chief Justiciar and Barons to the Treasurer and Barons.‡ It seems, however, to have been competent for any member of the council to have attended the Exchequer, and taken share in its business. In the reign of Edward the Second,§ Walter of Norwich, who had long and well served the Crown, was appointed, in recognition of his services and with a view to the continuance of his attendance without personal inconvenience, Chief Baron of the Exchequer. The office was subsequently continued, and was usually filled by a sergeant-at-law.

Three points in the history of this court deserve attention. It was, as we have seen, directly descended from the *Concilium Ordinarium*. It was not, in the proper sense of the term, a Court of Common Law. It was continually striving to extend its jurisdiction so as to include Common

* Madox, *Hist. Ex.*, i. 196. † Foss's *Judges*, iii. 3. ‡ *Ib.*, ii. 195.
§ Madox, *Hist. Ex.*, ii. 59.

Pleas. On the first point enough has been already said. Of the inferiority of the Exchequer to the two Benches, or rather its dissimilar position, there are many proofs. The Barons are not within the Statute of Treasons, but the Justices are. The statutes of *Nisi Prius** make no mention of the Court of Exchequer, but relate exclusively to the two Benches. In the latter of these Acts there is indeed a reference to the Exchequer, but it is of a very significant kind. It enumerates among the persons before whom *Nisi Prius* may be held the Chief Baron, "if he be a man of the law."† It would thus appear, and this view is confirmed by the history of the persons who have filled the office of Chief Baron, that it was usual to have at the head of the court a professional lawyer, and that the services of this officer were used in the same manner as those of any other high legal officer of the Crown. The original writs, too, were never made returnable to the Court of Exchequer,‡ but always to either Bench, according to their several natures; and an appeal from proceedings in the Exchequer lay not to the King's Bench, but to a special committee of the council.§ Some minor incidents also furnish strong evidence in the same direction. The Barons were never present at the conferences of the Judges, although the Chief Baron and the Attorney and Solicitor-General were. The Barons did not go on circuit, although Sergeants were frequently sent. The value of the rings given by Sergeants on their admission was less in the case of the Barons, and even of the Chief Baron, than in the case of the Justices. We find, too, that George Freville, Baron of the Exchequer, was while he held that office a

* 13 Edw. I. c. 30, and 14 Edw. III. c. 16.

† See Barrington, *Anc. Stat.*, 137, 249.

‡ 1 Spence, *Eq. Jur.*, 226, *n.*

§ 31 Edw. III. St. i. c. 12; 2 Reeves, *Hist. of Eng. Law*, 423. Foss's *Judges*, v. 417.

reader in one of the Inns of Court, a position which no judge ever occupied.

But although such was the legal position of the Court of Exchequer, the Barons of that court were not inclined to accept it. They necessarily exercised certain judicial functions. Their remuneration principally depended upon their fees; and they, like the justices of the King's Bench, cast many a longing look at the abundant business that flowed into the Court of Common Pleas. They accordingly encouraged the introduction of common pleas into their court. This practice was prohibited by a writ in the reign of John, on the ground of the delay and inconvenience which it caused in the determination of the King's causes. Subsequently the prohibition was renewed in the *Statutum de Scaccario* of Henry the Third. But the Barons were not so easily baffled; and, during the reign of Edward the First, no less than four other prohibitory mandates* were required to restrain their zeal for the enlargement of their jurisdiction. It was, however, settled† that the Exchequer had in personal actions jurisdiction of common pleas in three cases, namely when one of the parties was an officer, or a prisoner, or accountant of the court, or when a debtor of the Crown was prevented from discharging his debt to the King by the failure of his debtor in the performance of his obligations. By means of the last concession the Exchequer gradually obtained much of the coveted jurisdiction. A person who desired to sue in the Exchequer had only to issue a writ of *Quo minus*, or in other words to allege that he was the King's debtor, that the defendant owed him money and failed to pay it,

* *Writ of* 5 *Edw. I.*: *Statute of Rutland*, 10 *Edw. I.*: *Articuli Chartarum*, 21 *Edw. I.*: and a Royal Ordinance two years afterwards. See Foss's *Judges*, iii. 22.

† 2 *Inst.*, 551.

whereby he, the plaintiff, was the less able to discharge his obligation to the Crown. These allegations the court would not allow the defendant to dispute, but required him to answer on the assumption that they were true. When, therefore, in the reign of Elizabeth the judicial staff required reinforcement, the Court of Exchequer furnished the natural source of supply. In 1579* Sergeant Shute was created second Baron, with the express grant of the same rank and privileges as a puisne judge of either bench. All subsequent vacancies were filled by sergeants; and the court was thus withdrawn from its original range, and absorbed into the system of the courts of Common Law.

The early history of our law is to a great extent the history of conflicting jurisdictions. Apart from the old and long-continued quarrel of the ecclesiastical and the secular courts, there was, as we have seen, a keen competition between the various courts of Common Law. There was the still keener contest between the courts of Common Law and the council. There was the absorption by the Court of Chancery of the original civil jurisdiction of the council; and there was the conflict between the Courts of Law and the new authority of the Court of Equity. About the time of Henry the Third,† the tendency of the council to enlarge its jurisdiction at the expense of the Common Law Courts is apparent. Various motives, irrespective of any desire for personal advantage, led to this extension of authority. In those ages, disfigured in their quietest season by rapine and oppression,‡ the ordinary course of justice was frequently so obstructed by the defendants through riots, combinations of maintenance or overawing influence, that no inferior court could enforce its process. In such

* Foss's *Judges*, v. 409.

† Hallam's *Middle Ages*, iii. 250. ‡ *Ib.*, 145.

cases the interposition of a paramount authority was essential for any approach to good government. The courts of law impeded their own usefulness by their obstinate adherence to their precedents, and their resistance to any extension of them. An attempt was made in the reign of Edward the First* to extend the original writs, but its success was very limited. These courts exercised no preventive jurisdiction, and they punished as crimes some wrongs for which† compensation was appropriate. The rules of procedure, too, and especially that law of evidence which refused to allow the examination of the parties or to give any facilities for discovering facts within the knowledge or the possession of the defendant, caused a frequent miscarriage of justice. The expense, also, of litigation often presented an insuperable obstacle to the poor suitor. But to administer justice to the oppressed is the special duty of the Father of his country: and the care of the poor and needy has at all times been the bright particular star which has always shone forth with undimmed splendour, even in the darkest night of the church. Accordingly the ecclesiastics, who, as Chancellors, attended on the person of the King and advised him in his council, were prompt to do right to the poor man for whom the Common Law refused to provide adequate redress. So strong was this tendency that it seemed as if the allegation that the plaintiff was a poor man would, like the allegations in the proceedings before the King's Bench and the Exchequer that the plaintiff was in the custody of the court or was a debtor of the Crown, be sufficient to establish for the Chancellor a concurrent jurisdiction with the Common Law Courts in every subject of which they have cognizance. Against this assumption not only the lawyers, but the

* 13 Edw. I. c. 24. † 1 Spence, *Eq. Jur.*, 344.

House of Commons, vigorously protested. In the reign of Edward the Third and in the following reigns many attempts, both by petition and by statute, were made to restrain the growing jurisdiction of the council. In addition to various other enactments, it was in effect provided* that no one should be taken by petition or suggestion to the King in his council, whether in criminal or civil proceedings, or put out of his franchise or freehold, except by due course of law. These provisions were repeated in several subsequent Acts.† "Such, however," says Mr. Hallam,‡ "were the vacillations of a motley assembly, so steady the perseverance of Government in retaining its power, so indefinite the limits of ancient usage, so loose the phrases of remedial statutes, passing sometimes by their generality the intentions of those who enacted them; so useful, we may add, and almost indispensable, was a portion of those prerogatives which the Crown exercised through the council and Chancery," that soon afterwards the irregular proceedings before the council which had been thus emphatically prohibited were recognized by Parliament. The earliest of these recognitions was due to a different cause from those enumerated by Mr. Hallam. It arose out of what we should now call a papal aggression. The claims of the Pope to the suzerainty of England, in pursuance of the commendation of King John, were steadily resisted by the First and the Third Edwards, until in the fortieth year of the latter King the resistance culminated in a total repudiation of all such demands.§ Among the various legislative expedients by which the English Parliament sought in this controversy to protect themselves, were the Statutes of Premunire. This name was given from the initial words of the writ (*Praemoneri*, or, in the corrupt Latin of the time,

* 25 Edw. III. St. 5 c. 4.
† 28 Edw. III. c. 3; 42 Edw. III. c. 3.
‡ *Middle Ages*, iii. 253.
§ See Parry's *Parliaments*, 129.

Praemuniri facias) used to demand a citation of the party accused. It subsequently denoted, first the process, and next the penalty, under these statutes. Ultimately, the expression "the penalty of a praemunire" came to mean the penalty of outlawry, forfeiture, and imprisonment during pleasure in general, and without reference to the particular offences against which these penalties were originally directed. One * of the earlier statutes of this class, in order to check the growing danger of foreign interference, disregarded all domestic disputes, and called out for the national defence, if I may so speak, the whole judicial strength of the country. It gave, in the case of persons appealing to another court upon any matter within the cognizance of the King's Courts, concurrent jurisdiction to the council, the Chancellor, and the Justices of either Bench to deal summarily with such offences; and it authorized them to impose the severe punishments that I have mentioned. Some years afterwards it was provided † that those who made suggestions to the Chancellor and Great Council by which men are put in danger against the form of the Charter shall give security for proving them; and we find ‡ subsequent recognitions of the authority of the council where right cannot be had elsewhere.

It appears, upon the whole, that from the time of Richard the Second § the council acquired an extensive coercive jurisdiction. But this jurisdiction was, as Lord Hale ‖ tells us, gradually brought into great disuse, though there remain some straggling footsteps of their proceedings till the accession of Henry the Seventh. The principal cause of this disuse of the council's jurisdiction was the gradual growth of the equitable jurisdiction of the Court

* 27 Edw. III. St. 1 c. 1. † 37 Edw. III. c. 18; 38 Edw. III. c. 9.
‡ 1 Spence, *Eq. Jur.*, 353. § Palgrave, *On the Council*, 45.
‖ *Jurisd. of Lords' House*, 38.

of Chancery. The Chancery, like the Exchequer, was originally a department or public office,* and not a court. It was attendant on the person of the King; and its staff included the Chancellor and the Masters, who were generally ecclesiastics and whose duty was to hear and to examine the petition of complainants and to afford them due remedy by the King's writ. Before the reign of Edward the Third the Chancellor appears never to have exercised judicial functions unless when directed by the council or when acting by its authority; and when he acted ministerially, he was assisted by his Masters. But the Chancellor, a learned and dignified ecclesiastic and skilled in the Roman law, was in matters of law the chief adviser and guide of the council. He was the head of an organized department, and had at his disposal proper machinery for enforcing his decrees. It was inevitable that a single will, to which habitual deference was paid and which was armed in its own right with sufficient power, should establish its separate authority. In the reigns both of Edward the First and of Edward the Second petitions addressed to the King or to the King and his council were frequently referred to the Chancellor for justice.† In the reign of Edward the Third a much greater advance was made. The Chancery ceased to follow the King, and became stationary‡ like the Courts of Common Law. The separate jurisdiction of the Chancellor was recognized by Parliament.§ The Chancellor began‖ to decide causes as a Judge in Equity. Several attempts were made to restrain the jurisdiction of the Chancellor in the same manner in which attempts were made to restrain the

* Palgrave, *On the Council*, 14.

† Hallam's *Middle Ages*, iii. 242-3.

‡ 1 Spence's *Eq. Jur.*, 340.

§ 27 Edw. III. St. 1 c. 1; 36 Edw. III. St. 1 c. 9.

‖ Palgrave, *On the Council*, 69; Hardy's *Introd. Close Rolls*, 28: *Middle Ages*, iii. 246.

jurisdiction of the council. In the reign of Richard the Second the Chancellor was empowered * to give to the party aggrieved damages in cases before the council or the Chancery grounded upon false suggestions. This Act seems to have produced greater regularity in the proceedings of the court. From the year in which it was enacted, bills in Chancery and the answers to them have been regularly filed: the grounds on which relief is demanded appear, and the Chancellor renders himself in every instance responsible for his orders by thus showing that they come within his jurisdiction.†

Various petitions from the Commons were presented in the reigns of the Lancastrian Kings complaining of the encroachments of the Court of Chancery. It would seem that about the reign of Henry the Sixth ‡ a sort of tacit compromise was effected. The Court of Chancery ceased to interfere with matters of Common Law. The Common lawyers acquiesced in the independent remedial jurisdiction of Chancery. About the latter part of that reign the extension of the Chancellor's authority over feoffments to uses was established.§ This great event, to which as it resulted from their own rulings the judges could raise no objection, both enhanced beyond all previous precedent the authority of the Chancellor, and opened a new era in the history of our law. At length, in the reign of James the First, a vigorous attempt to repress this ever-encroaching jurisdiction was made by Lord Coke. That great master of the Common Law was animated not only by the jealousy of his profession but by a tenacious regard for his own dignity, and still more by a personal enmity towards the then Chancellor, Lord Ellesmere. He insisted that any attempt to sue in another court after judgment at law was

* 17 Rich. II. c. 6.
† Hallam, *Middle Ages*, iii. 247.
‡ *Ib.*, 249; 1 Spence, 349.
§ Hallam, *ubi supra*, 249.

contrary to the Statute of Premunire;* and, in two cases where the merits at least were clearly against him, he caused indictments to be filed against persons who had invoked the aid of Chancery against a judgment which had been obtained by fraud. The King referred the question for the opinion of his law officers, and upon their report in favour of the Chancellor's claim made an entry upon the Council Book that the Chancellor had not exceeded his jurisdiction. Notwithstanding some late attempts to revive the controversy, this strange exercise of the prerogative seems to have been generally accepted as conclusive. From that time at least the authority of the Chancellor has been exercised without interruption.†

§ 6. The growth of the equitable jurisdiction of the Court of Chancery naturally absorbed much of the civil jurisdiction of the council. This jurisdiction, however, was not taken away, and an additional organ for its exercise was created. An order in Council‡ was made in 1390 which provided that the bills of the people of lesser charge should be examined by the Keeper of the Privy Seal and such of the council as should be present with him. When the council met for this purpose, it sat in the White Chamber, and was known as the Court of Requests. This court was in fact a subsidiary Court of Equity. It sprang from the same source as the Court of Chancery. It was under the presidency of the Keeper of the Privy Seal, just as the Court of Chancery was under the presidency of the Keeper of the Great Seal. It had a similar jurisdiction, a similar staff of civilians, and a similar

Other judicial developments of Ordinary Council.

* 27 Ed. III. St. 1. c. 1.

† See 2 Swanston's *Reports*, 22, *note;* Hallam, *Const. Hist.*, i. 345; Gardiner's *Hist. of Eng.*, ii. 269.

‡ 13 Rich. II. See 1 Spence, 351.

process. It also came into collision with the Courts of Common Law, but with a fortune different from that of its sister court. In the reign of Elizabeth the Court of Common Pleas adjudged* that "this which was called the Court of Requests or the White Hall was no court that had power of judicature." It would seem, however, that notwithstanding this decision the Court of Requests was reserved for a higher function, as occasion might require, than that of a minor Court of Equity. Lord Bacon† tells us that "there was always reserved a high and permanent power to the King's Council in causes that might in example or consequence concern the state of the Commonwealth ; which, if they were criminal, the council used to sit in the chamber called the Star Chamber ; if civil, in the White Chamber or White Hall."

The same process by which the civil jurisdiction of the council was exercised by distinct tribunals tended to give to its criminal jurisdiction increased strength and a more definite character. Out of the old council sitting in the Starred Chamber there had been developed three courts, two of civil and one of criminal jurisdiction. The two former, those which had in the words of Bacon "the Prætorian power of Equity," were, as we have seen, the Court of Chancery and the Court of Requests. The third, that which had "the Censorian power for offences under the degree of capital," was the Star Chamber properly so called. This court—in other words, the Privy Council sitting judicially—was indeed the mother court from which the Courts of the Keepers of the two Seals had been detached ; and when it became in effect a Court of Criminal Equity, it naturally retained, even while it had abandoned most of its old powers, the original designation. It has been

* *Stepney's Case*, 4 *Inst.*, 97. † *Works*, vi. 85.

sometimes supposed that this court was established by an Act of Henry the Seventh,* and that its jurisdiction was limited to the cases therein specified. This Act gave jurisdiction to the Star Chamber in seven cases — viz., maintenances, giving of liveries, having retainers, embracery, jurors receiving money, untrue demeanours of sheriffs in false returns and panels, routs and riots. It was, however, "solemnly adjudged † by the chief judges of England, Sir Edward Coke and the Lord Howard, attended by the King's learned counsel, then Sir Francis Bacon and Sir Henry Yelverton, in the cause betwixt the Earl of Northumberland and Sir Stephen Proctor, and published in open court, that the Statute 3 Henry VII. extended not any way to this court; but that the Lords authorized by that Act may at all times in all places determine of the matter therein specified." In accordance with this decision, demurrers to the jurisdiction of the court in proceedings not within the statute were on several occasions overruled;‡ and the doctrine was established that "the court subsisted by ancient prescription, and had neither essence nor subsistence by that Act of Parliament." The Star Chamber seems to have discontinued the exercise of its civil jurisdiction about the time of Queen Mary,§ and during the remainder of its existence was exclusively a criminal court. In this capacity its jurisdiction was limited only in respect of the punishment that it could inflict. It could deal with every offence, and inflict every punishment except that of death. "In a word," says Hudson, "there is no offence punishable by any law but if the court find it to grow in the Commonwealth this court may lawfully punish it except only when life is questioned." In this court the defendant

* 3 Henry VII. c. 1.

† Hudson on the *Court of Star Chamber* in 2 *Collect. Jurid.*, 10.

‡ *Ib.*, 51. § *Ib.*, 55.

was examined upon interrogatories in the same manner as in Equity,* and the rules for the examination of witnesses were favourable for the Crown.† The punishments, although they fell short of death, were severe enough to strike terror into the boldest. Ruinous fines, cruel mutilations, and life-long imprisonments were freely inflicted. Thus the Star Chamber became under the Tudors, and still more under the Stuarts, the great engine of despotism. Its abolition‡ was not the least of the many reforms of the Long Parliament in its early days.

The courts whose history we have been considering involved a greater or less degree of encroachment upon the jurisdiction of the Common Law. Other derivative courts were less open to this objection. Wherever the King's authority extended, there he possessed jurisdiction. It was his special function to do right to all his subjects at all times and in every place. Where the Common Law failed to reach, or where it had made no provision, the King and his council took care that right should be done. But the Common Law never noticed any controversies that arose outside the realm. Such matters fell, according to their nature, under the cognizance of different courts. Matters that happened on the sea were under the jurisdiction of the Admiral. Matters connected with military proceedings, and that arose out of the realm, were within the cognizance of the Constable and the Marshal. A considerable amount of ecclesiastical business, too, in which the King was concerned, seems to have been properly transacted by the council.§ These courts proceeded principally according to the Civil Law. Both the Admiral and the Constable had a civil and a criminal jurisdiction. Their authority is of uncertain date, but it was undoubtedly of

* Hudson on the *Court of Star Chamber* in 2 *Collect. Jurid.*, 169.
† *Ib.*, 200. ‡ 16 Car. I. c. 10 § Palgrave, *On the Council*, 130.

great antiquity. They were recognized and their proper limits were defined by Parliament in the reign of Richard the Second. A statute* of that reign, after reciting various accroachments of the Admiral's Court to the prejudice of the Common Law, provided that admirals and their deputies shall not meddle from thenceforth "of anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble Prince, King Edward, grandfather of our Lord the King that now is." A similar Act† respecting the civil jurisdiction of the Constable and Marshal was passed in the same year; and another respecting the criminal jurisdiction of these officers at the beginning of the next reign.‡ The office of Constable has been extinct since the time of Henry the Eighth; and his court has long been obsolete. The criminal jurisdiction of the Admiral has been transferred by Parliament§ to the ordinary criminal courts; but his civil jurisdiction, regulated and extended by modern legislation, still remains.

§ 7. The jurisdiction of ultimate appeal is administered in England by two distinct bodies. Appeals from all the Courts of Law and Equity in the United Kingdom are determined by the House of Lords. Appeals from the Ecclesiastical Courts, from the Courts of Admiralty, and from the courts of the colonies or other dependencies, and some other appeals of minor importance, are determined by the Queen in Council. The origin of this difference may be inferred from what I have already stated. The former class represents the Common Law of England as administered by the *Magnum Concilium*. The latter represents the Special

Double jurisdiction of Ultimate Appeal.

* 13 R. II. St. 1. c. 5. † 13 R. II. c. 2. ‡ 1 H. IV. c. 14.
§ See, as regards the colonies, 12 and 13 Vict. c. 96.

Jurisdiction of the Crown as exercised by the *Concilium Ordinarium*. The one system concerned the freeholders of England ; proceeded upon their traditional laws and customs ; and was administered in the courts of which they were members or by judicial bodies organized with their consent. The other system dealt with cases with which the Common Law had no concern, with matters affecting churchmen, or with matters external to the realm of England whether they happened on the seas or in some foreign possession of the Crown. In all such cases, whether out of the reach of the Common Law or unprovided for by it, the King, as the fountain of justice, exercised jurisdiction. This prerogative, like all other prerogatives, he exercised with the assistance of his council. But where the Common Law was silent, recourse was had almost of necessity to the Roman Jurisprudence ; and the ecclesiastics, upon whom in early times the conduct of the legal business of the council and its derivative courts devolved, naturally adopted the model with which they were familiar. Thus we may trace throughout our institutions the twofold stream of law—the one the High Court of Parliament and its derivative jurisdictions, all following the practice of the Common Law : the other, the Ordinary Council and the various tribunals which sprang from it, all of whom recognized the authority of the Civil Law.

The appellate jurisdiction of the House of Lords over the Courts of Common Law has never been disputed. It was, as we have seen, expressly recognized in the Act by which the Bench was established, and it has been in fact uninterruptedly exercised. In its present form, however, it includes two other subordinate courts whose dependence seems at first to be inconsistent with the explanation that I have proposed. Both the Court of Exchequer and the

Court of Chancery were derived from the *Concilium Ordinarium*, and yet from each of these courts appeals lie not to the Privy Council, but to the House of Lords. This jurisdiction, however, did not always exist. In the Exchequer I have already said that the appeals were originally heard by delegates appointed by the Crown, in the same manner as in ecclesiastical or admiralty causes. But when the Court of Exchequer was placed on the same footing as the other courts—when, in fact, it was absorbed into the Common Law system and was incorporated with it—it naturally followed the Common Law appellate jurisdiction. The case of the Court of Chancery was similar. In that court the regular mode of appeal was by petition to the King, praying a re-hearing before him or commissioners appointed by him.* The House of Lords never attempted to hear Equity appeals before the accession of James the First; and, indeed, no precedent of any right for such interference is found before the meeting of the Long Parliament.† In the following reign violent disputes respecting the jurisdiction of the House of Lords arose between the two Houses of Parliament. The House of Lords claimed both an original jurisdiction, exclusive in the case of their own members and concurrent with the Court of Equity in all other cases, and also an appellate jurisdiction over that court. Both these claims‡—the former in the case of *Skinner v. The East India Company*, the latter in the case of *Shirley v. Fagg*—were strenuously resisted by the Commons. The Commons, at first, merely contested in the latter case the exemption of their own members from such suits; but as the dispute grew warmer, peremptorily denied the right of the Lords, in any circumstances, to hear such appeals. These controversies, like so many others in our history,

* Sir M. Hale's *Jurisd. of the Lords' House*, 186. † *Ib.*, 194.
‡ *Ib.*, Mr. Hargrave's *Preface*, cii. *et seq.*, cxxxv. *et seq.*

were in effect tacitly compromised. The Lords, after the reconciliation which the King effected in Skinner's case, never renewed their claim to an original jurisdiction. The Commons never again, after Shirley's case, objected to the appellate jurisdiction of the Lords in Equity. They seem, indeed, to have considered that the Court of Chancery had become one of the established courts for the administration of justice between Englishmen in English controversies; and that it was more consistent with analogy and more safe that this jurisdiction should be controlled by an independent assembly like the Lords than by commissioners appointed by the Crown.*

The same disposition which led the Ordinary Council to extend its original jurisdiction at the expense of the Courts of Common Law induced it to attempt a still bolder innovation. It claimed the power of reviewing the decisions of either Bench. But this assumption was too glaring, and was quickly repressed. There is in the *Year Book*† of Edward the Third "a notable case," in which the Chancellor, before the council, reversed a judgment of a court of law. But the justices, says the *Year Book*, paid no regard to the reversal before the council, for that it was not the place where judgment could be reversed. In accordance with this case, Sir Matthew Hale‡ tells us that "it was the constant opinion and practice to disallow any reversals of judgment by the council." But over those courts which derived their origin from the council its power of review did not admit of dispute. It exercised this power, as I have said, over the Courts of Exchequer and of Chancery as long as these courts continued outside the domain of the Common Law. Even at the present day the council determines appeals from the Chancellor in matters relating to lunatics

* *Jurisd. of Lords' House*, Mr. Hargrave's *Preface*, clxv.

† *Y. B.*, 39 Edw. III. 14. ‡ *Jurisd. of Lords' House*, 41.

and idiots, whose care belongs in a special manner to the *Parens Patriæ*, and does not come within the jurisdiction of the courts of Common Law. The oldest form, however, of the council's appellate jurisdiction was probably in the case of the Admiralty. In the reign of Henry the Eighth the operation of the judicial machinery of the council was extended to ecclesiastical causes. Its authority over the administration of justice in the foreign possessions of the Crown is of earlier date. The Channel Islands seem at all times to have addressed their petitions to the King and his council. Calais came under the same class. When the colonies were founded, their appeals were heard in the same manner ; and subsequently British India was brought within the jurisdiction. This jurisdiction appears to have been questioned in the time of Elizabeth, but to have been then formally confirmed. An Order in Council in 1565,* referring apparently to the practice of appeals from the Channel Islands at a period long antecedent, directs that "no appeals should be made for any sentence or judgment given in the same isles hither, but only according to the words of their charter, *Au Roy et a son conseil*, which agreeth, as Sir Hugh Paulet allegeth, with such order and form as hath heretofore been accustomed."

The judicial machinery of these bodies requires some notice. In the House of Lords it is now understood that no lord who is not of judicial† standing votes upon the hearing of any appeal. The steps by which this result has been attained may easily be traced. At first the Lords voted indiscriminately on judicial questions, as upon any other question. Then it became customary on

* See Cox's *Eng. Gov.*, 487.

† Lord Kingsdown never sat upon the Bench, but he had great professional experience and had refused the Great Seal. Lord Denman, a barrister, but not of judicial rank, voted in 1883 upon the appeal case of *Clarke v. Bradlaugh*. His action, however, was not favourably regarded.

such questions to require the advice of the judges. If the judges were unanimous, the Lords* usually followed that opinion. If the judges or the law lords differed, the other lords voted in accordance with the opinion of the adviser in whom they severally felt the most confidence. At length in Mr. O'Connell's case, in 1844, the lay lords, although much inclined to take part in the proceedings, abstained from voting. The occasion was such as to render this forbearance very remarkable. It was a conviction for a political offence. Political feelings were at that time strong, and the Conservative lords had the majority. The merits of the conviction were generally admitted : and its reversal turned upon a mere technicality. On this point a large majority of the judges advised that the conviction ought to be maintained. The law lords divided three to two in favour of the reversal. There was therefore ample excuse for the interference of other lords in support of that view to which the weight of judicial opinions inclined, and which they believed to be on political grounds highly expedient. Since that time the principle that this jurisdiction ought to be exercised only by the professional members of the House has been regarded as fully established.† But this is merely a matter of custom, and the youngest and most inexpert peer has still the same legal power of decision on every appeal as the most experienced law lord.

The jurisdiction of the Privy Council was formerly exercised by Commissioners appointed for each case under the Great Seal by the King. From this practice there was formed, under the Acts‡ of Henry the Eighth and Elizabeth relating to ecclesiastical and other appeals, the High Court

* Sir M. Hale's *Jurisd. of the Lords' House*, 159.

† Sugden's *Law of Property as Administered by the House of Lords*, 28.

‡ 25 Henry VIII. c. 19; 5 Eliz. c. 5.

of Delegates, which was long the organ of the Privy Council in judicial matters. This court was in 1834 abolished by Act of Parliament,* and its functions were transferred to the Judicial Committee, which has been regulated by various Acts† of the present reign, consists of members of the council who either hold or have held high judicial positions, and reports upon each case after due judicial investigation to Her Majesty in Council. The report so made is read at the next meeting of council, and judgment is pronounced accordingly.

§ 8. There still remains for our consideration one of the recognized councils of the Crown, the Council Learned in the Law. Lord Coke expressly mentions this council, and declares that it consists of the Judges. This statement must not be confined to the strictly judicial duties of the Bench. I do not think that at any time the justices of the two Benches, or of either of them, were described as the Council of the King. But these officers had other duties. We have seen that Edward the First specially required‡ the attendance upon his person of the Chancellor and the justices of his Bench. By their oath of office as prescribed by statute the Judges are bound to counsel the King in all his lawful business. They have accordingly been accustomed, although the practice has for some time fallen into disuse, to advise the Crown when so required. They still advise the House of Lords, a practice which seems to be a relic of the time when the Judges and the other members of the Ordinary Council were included in, or at least were attendant on, the Great Council. I have already said that the Judges were not the only legal

The Council Learned in the Law.

* 3 and 4 Wm. IV. c. 41.

† 6 and 7 Vict. c. 38; 7 and 8 Vict. c. 69; 14 and 15 Vict. c. 83 s. 15; 20 and 21 Vict. c. 77 s. 115.

‡ 28 Edw. I. St. 3 c. 5.

members of the Ordinary Council. The Chancellor, the King's Sergeant and his Attorney, sometimes the Chief Baron, and perhaps the Masters in Chancery, were members of that body. A meeting of the functionaries for the consideration of legal business was a meeting of the council; but in distinction from other meetings for different purposes was styled a meeting of the Learned Council. So Lord Coke* tells us that the Exchequer Chamber was sometimes called the Council Chamber, because it was the place in which the Learned Council used to sit.

The Learned Council was thus one form of the developments of the Ordinary Council. The same specializing power, however, which called it into existence ultimately led to its practical extinction. In or before the time of Lord Coke a change in its constitution seems to have been accomplished. The Judges appear to have regarded themselves as the sole members of the Learned Council, and to have treated the inferior law officers as their attendants. Such at least seems to be the explanation of Lord Coke's limitation of the Learned Council to the Judges. His language is still more explicit on another occasion, when he asserts† that "the ancient use that hath hitherto been to our predecessors" was that the justices being assembled application should be made to them for their opinion by the Attorney or Solicitor-General. In the reign of Elizabeth a further innovation was made. Francis Bacon,‡ as a sort of compensation for his frequent disappointments in his application for office, was appointed, although he

* 4 *Inst.*, 106. † 12 *Reports*, 131.

‡ In the dedication to his *Arguments* (*Works*, vii. 534) Bacon speaks of himself as appointed "by His Majesty's rare if not singular grace to be of both his counsels:" that is, as it appears from the beginning of the *Amendment of the Laws*, he was made Privy Councillor while he remained Attorney-General or a leading member of the Learned Council.

held at the time no other office, one of Her Majesty's Council Learned in the Law. Subsequently his patent was renewed, although in very guarded terms, by James.* This precedent has since that time been constantly followed. But the specialization of functions has continued to operate. The Judges were gradually left to the performance of their judicial duties. Twice in the reign of George the Third—once in 1760 on a point connected with the proposed court martial on Lord George Sackville for cowardice at Minden,† and again in 1772 on the subject of the Royal Marriage Act,‡ their assistance was required. In 1823 a reference to the Judges§ was made by the King in Council upon the question whether the Lord-Lieutenant of Ireland had since the Union the power of conferring knighthood, a question which was answered in the affirmative. I have not met with any later instance. The professional assistance which the Executive needs is now rendered by its law officers, the Attorney and the Solicitor-General, and the counsel attached to the various departments. The distinction of a member of the Council Learned in the Law, or as it is now usually termed of Queen's Counsel, has become, like that of a member of the Privy Council, merely titular. It involves, indeed, some professional privileges and disabilities, but it brings with it no active duties on behalf of the Crown and no emolument.

Severe comments have frequently been made both upon the Judges of former times for the practice of giving extra-judicial opinions and upon the ministers who in requiring such opinions are supposed to have tampered with the purity of the Bench. Yet this practice was in perfect accordance both with the law and the custom of

* See Foss's *Judges*, v. 419.
† Broom, *Constit. Law*, 151.
‡ May, *Const. Hist.*, i. 223.
§ Nicolas, *Hist. of the Order of Knighthood*, i. 13, *note*.

the time. The words of the Judges' oath are, as we have seen, distinct; and these words were interpreted by the usage of centuries. There seems to be no instance on record* in which the Judges, although they have often declined to advise the House of Lords, have withheld their assistance from the Crown. The supposed refusal of Lord Coke to give an extra-judicial opinion in Peacham's case is one of those popular errors which, when they fall in with popular prejudice, are difficult to eradicate. The error, too, has become firmly established from the unfortunate sanction of Lord Macaulay,† and, what is still more strange, of Mr. Hallam.‡ But Lord Coke never refused, either in Peacham's case or on any other occasion, to advise the Crown. On the contrary, his reports contain accounts of numerous conferences in which he took part. His objection to the particular or auricular taking of opinions, as he called it, was something very different from that which is usually attributed to him. He did not choose that each of the Judges should be asked for an opinion separately, and so, without consultation and possibly on misrepresentation as to the views of his colleagues, be entrapped into some improvident expression. He insisted that the Judges should, according to their custom, meet together for the purposes of debate, and after proper consultation should deliver their joint opinion. The innovation, therefore, of which Coke complained was not the request for the Judges' opinion, but the mode in which that opinion was sought. So far from the consultation of the Judges in the usual manner being thought improper, it was by this method that many points of great importance were decided. Such was that "grave and safe opinion and advice mixed with law and convenience"§ which the

* *6 Law Magazine and Review*, 43.
† *Essays*, ii. 332.
‡ *Const. Hist.*, i. 343.
§ Bacon, *Works*, vi. 37.

Judges gave, on his accession, to Henry the Seventh, that the devolution of the Crown on an attainted person purges all the consequences of the attainder. Such was the denial of the legislative force of Royal proclamations. Such, too, was the denial of the power to take evidence by torture. It is true that in the present high development of our institutions the Judges have practically been relieved of this duty, and that this complete separation of functions is in itself a mark of an advanced political system. But we ought not to denounce as vicious that which was merely imperfectly developed, or to attribute baseness and corruption to the judges and the statesmen who lived under a system less perfect than our own, and who fairly administered that system as it then existed.

CHAPTER XII.

THE LANDS OF THE CROWN AND THEIR TENURES.

The varieties of landed property.

§ 1. Our early history notices several classes of landed property which need to be carefully distinguished.* The first is the land which belonged to the Crown, and was in its direct occupation. The second is the land which was the private inheritance of the King, and which did not merge in his crown. The third is the land which was the inheritance of other persons, whether corporate or individual. The fourth is the land which belonged to the community at large, not yet reduced into private property, and available only for commonage, or at most for a temporary occupation. Over the lands which belonged to his kingdom the King seems in early times to have exercised the same powers as a bishop or other corporate person could exercise over the lands of his see. He might use them as he pleased during his life, but he was bound to transmit them undiminished to his successor. Over his private lands the King exercised the same powers as those of any subject over his inheritance.† The King's private estate passed to his heir and not to his successor, and might be transmitted at his pleasure by his Will. Of the land granted in private property, or Bocland,

* Kemble's *Saxons in England*, ii. 30; Allen, *On the Prerogative*, 135, 151.

† Allen, 143.

I shall presently treat. The Folcland, or land of the people, could only be dealt with or alienated with the consent of the Witan. These distinctions, however, were gradually confused.* It is difficult to separate in our early history the acts of the King as a private owner from his acts done in virtue of his royalty. There was a constant and natural tendency to confound, as the power of the Crown increased, the patrimony of the individual who then wore the crown, the property annexed to the Crown itself, and the public lands of which the King was the chief guardian and trustee. After the Conquest this tendency was greatly increased. It was the policy of the Conqueror that every acre in the kingdom should owe some duty to the Crown. The duty of the Bocland was represented by the services of men-at-arms. The Folcland became Crown land. All the land in the country, indeed, might be included within the latter description. It was held either of the King or by the King. It either was in the hands of proprietors who were bound by their tenure to render certain services to the Crown, or was held in the direct possession of the King himself and for his support. Thus the Conqueror retained in his own hands 1,422 manors in different parts of the country, besides his lands in those counties which are not recorded in "Domesday Book." The classes, therefore, of land which I have above enumerated were thus reduced to two. One was the lands held by various tenures and owing to the King as Lord Paramount various duties or services. The other was the lands which, by whatever title, the Crown had acquired, and of which for its own support and advantage it retained the possession. Of each of these classes I propose in the present chapter to treat.

* Kemble, i. 80.

§ 2. It was at one period customary to describe Feudalism as a source of unmixed evil, and its introduction into England as one of the worst consequences of the detestable tyranny of the Normans. Later writers regard this system, not as the cause of its contemporary troubles but as an attempt to remedy them —incomplete, indeed, and bringing with it many inconveniences and dangers of its own, but nevertheless not unsuccessful. To the men who lived under its operation Feudalism seemed the very vital principle of society. By it and by it alone, so far as their experience extended, could order be maintained and property secured. Feudal principles penetrated deeply into every form of thought and of speech and of action.* Upon them were modelled the ceremonies of the knightly degree and of the marriage rite. Upon them was founded the ideal of a future world: upon them the Church rested in part her claim to general jurisdiction. On their basis men constructed their political theories or framed the actual government of their new possessions. The same motives which induced the sons of the victors of Hastings to introduce Feudalism in its utmost rigour into their new kingdom of Jerusalem † had induced their fathers to adopt these principles in England. The Norman Knights who followed Godfrey of Bouillon were not less free born or less bold than those who followed Duke William. Yet they too were content to accept in Palestine, as their fathers had been content to accept in England, their portion of the conquered land as fiefs from their leader and subject to the whole long list of feudal burthens. It is indeed probable that the military services which William imposed were not materially different from those which every Norman vassal was

The free tenures.

* Mr. Pearson's *Early Hist. of Eng.*, 429. † 1 Spence's *Eq. Jur.*, 91.

accustomed to render; and differed only in their greater precision from the obligations incident to English alodial lands. Whatever the changes may have been, they were certainly made not of William's own mere motion* but with the advice and consent of the Legislature of the kingdom. About twenty years after the battle of Hastings, under the apprehension of frequently threatened invasion by the pirates of the north, and with domestic tranquillity far from assured, the Conqueror effected a complete military and financial organization of his realm. He instituted that great survey, the record of which still remains as the most precious memorial of our early history. This famous book long served as the muster roll of the nation. It was the muniment of title to the hereditary revenue of the Crown. It was the authority by which all disputes relating to land between subject and subject were decided. This survey was ordered by the King in his Court at Gloucester at Christmas, 1085, after grave deliberation with his Great Council of Proceres: the recorded results were brought to him at Winchester at the following Easter. On the first of the following August the King held his Court at Salisbury. "And there there came before him his Barons and all landholders who were of any account, of whatsoever fief they were; and they were all made his men, and swore to him fidelity against all men."† This event may be taken as marking the commencement of English feudalism; and I now proceed to describe briefly, and so far as my present purpose requires, the tenures which were thus recognized.

"Tenures," Lord Bacon‡ observes, "are of two natures, the one containing matter of protection, the other matter

* *Ed. Rev.*, xxvi. 353.

† *Annals of Waverley*, cited in 1 *Lords' Report*, 34.

‡ *Works*, vii. 547.

of profit. That of protection is likewise double, divine protection and military. The divine protection is chiefly procured by the prayers of holy and devout men. This begat the tenure in frankalmoigne which, though in burthen it is less than socage, yet in virtue it is more than a knight's service. For we read how, during the while Moses in the Mount held up his hands, the Hebrews prevailed in battle —as well as that, when Elias prayed, rain came after drought, which made the plough go: so that I hold the tenure in frankalmoigne in the first institution indifferent to knight-service and socage." It seems, indeed, scarcely accurate to describe frankalmoigne as a tenure. It was rather a continuance of the old alodial property kept alive for the purposes of the Church, and limited to ecclesiastical property alone. So far as it is a tenure, frankalmoigne is not feudal, but spiritual. Its services were indefinite and of a religious nature, consisting, until the duty was altered by Act of Parliament at the Reformation, in the obligation to pray for the souls of the donor and his heirs, dead or alive. It required no fealty, and implied no burthensome incidents of aid or of scutage. For a breach of its obligations no other remedy* was provided than the interference of the Bishop. By the Statute of *Quia Emptores* no subject may grant lands in perpetuity to hold of himself. But tenure in frankalmoigne is necessarily of the grantor and his heirs, and is in perpetuity. It follows, therefore, that, since 1290,† the Crown alone can grant lands by this tenure. The tenure is expressly preserved in the Act of Charles the Second for the abolition of the military tenures, and it subsists in many instances at this day.‡

The military tenures were of two kinds, grand serjeanty§

* 1 Stephen, *Com.*, 214.
† 18 Edw. I. c. 1.
‡ *Ib.*, 215.
§ *Ib.*, 198.

and knight-service. The former is of little historical importance. Its obligation was the rendering of some specified service of an honorary nature and connected with the Royal person. To carry the King's banner or his lance, or to lead his army, or to carry his sword before him at his coronation, are some of the examples which Littleton gives of this tenure. These services are still reserved by the Statute of Charles the Second, although the tenure in other respects is converted into free socage. But the great military tenure of the kingdom was knight-service. The kingdom was divided into portions held of the Crown and hereditary. Each such portion was termed a Knight's Fee, and was required to supply, on the summons of the King, a mounted and armed warrior, to attend, at his own cost, during forty days in each year, the King upon his military expeditions, wherever he went. The total number of such fees was about 60,000; and thus the King could rely on the services of a fully equipped army of 60,000 knights. We are not, however, to understand that 60,000 soldiers were, either at the Conquest or afterwards, actually quartered throughout the country. The Knight's Fee was not meant to express either any mode of territorial settlement or any definite amount of property. It merely denoted the unit of taxation. Any person might hold any number of Knight's Fees, provided he discharged the full obligation of his tenure; and each fee might be divided into any number of parts, each of which was charged with its proper proportion of the entire burthen. The tenants in chief were, as a body, responsible for the services of 60,000 knights. Whether each tenant in chief kept on his estate the stipulated number, or any other number, was a matter for his own consideration. He might underlet his lands to a greater number of knights than he was bound to produce. He might, if he thought fit, retain all or most of his land

in his own hands, and make up the number of his knights as best he could when the summons came. All that the Crown required was the services of the proper contingent. The mode of providing that contingent rested with the feudatories themselves. Their general treatment of their lands was similar to the mode in which the King treated his lands. Each tenant in chief retained as much land as he could conveniently occupy, and granted the remainder by some form of free tenure. His demesne lands were cultivated by his villeins, some of whom ultimately became copyholders. His free tenants stood in the same relation, and were bound by similar obligations to him as he to the King. Each of these tenants might repeat this process, and establish similar relations between himself and those who held of him. This practice continued until 1290, when it was provided by the Statute *Quia Emptores* that all future grants should be held not of the grantor but of the original lord.

The third species of tenure with which we are now concerned is socage. The characteristic of this tenure was that its services were definite, and that they were free. In the former respect it differed from knight-service, in the latter from villenage. The nature of the services varied in each case. To pay a fixed yearly sum, or to plough for three days the lord's lands, are examples of their obligations. When the land was held of the King, and the service was the annual render of a bow, a lance, a pair of mail gloves, or some similar instrument of war, this form of socage was called petit serjeanty.* As compared with the tenure of knight-service, the principal advantage of socage seems to have been its freedom from escuage and from wardship and marriage.

* *Co. Lit.*, 108, *a*.

When lands of whatever tenure were held of any lord immediately and without any intervening tenancy, they were said to be held *in capite*. This expression, although it was applicable to any lord, was most frequently used in reference to the tenants of the Crown. With them, as with all others, it denoted the proximity of the tenure, and not the character of the service. By degrees its original meaning became obscured, and it was used to denote a special form of tenure. Thus Queen Elizabeth, in the forty-second year of her reign,* granted to certain persons lands in Wiltshire "to hold of us our heirs and successors as of our Manour of East Greenwich in the County of Kent by fealty only in free and common socage, and not *in capite* or by military service." The same form occurs in several other patents of that reign. In the Act for the Abolition of Military Tenures † tenure *in capite* is expressly abolished. This singular enactment has not been very strictly construed, and most of the land in the kingdom is now in fact held *in capite*. But the prohibition of the Act still remains, an example of the incredible carelessness with which legislation on matters affecting the whole property of the country has sometimes been conducted, and a warning against accepting the records of a later age as conclusive evidence of the acts or the customs of antiquity.

§ 3. The tenants in chief of the Crown had besides their stipulated services other obligations. They were the King's men, his barons as they were emphatically called. They had done him homage, and sworn to him fealty. Between him and them there subsisted a very peculiar relation. It had all the personal intimacy of the relation between the patron and the client. It had some

The incidents of tenure.

* Madox, *Hist. Exch.*, i. 821.

† 12 Car. II. c. 24. See Hallam, *Middle Ages*, iii. 240.

of the hard dry self-regarding character which marks the modern connection of the landlord and the tenant. It differed from the former, because it implied a bargain in relation to land. It differed from the latter, because it mingled with such a bargain the warm feelings and glowing sympathies of the soldier to his chief. It differed also in another respect from a modern tenancy, for the payment was made not in money, but in the specific render of military services. From these considerations, from the peculiar character of the original feudal tie—a personal relation but based upon the tenure of land, an exchange where interest and sentiment were blended—several consequences of great importance followed.

Since the feudal relation was a contract of mutual fidelity and support between the owner of certain land and its occupier, the personal character of the parties formed a material element in the transaction. The vassal did not swear fealty to his lord because the lord was the owner of the soil, but rather plighted his faith to the owner of the soil because he was his lord. He might well be content to hold his lands under the protection of an honourable and powerful chief, and yet refuse to transfer his fealty to a feeble or spiritless craven. The lord in his turn had to consider the services which he was to receive for his land and his protection. There might be a wide difference to him in the services of the valiant soldier whom he originally enfeoffed, and those of that soldier's representative or assignee. He might have for his tenant the halt or the blind, a woman or a child, an enemy, or at least one who sympathized with his enemies. It was therefore reasonable that every change which was made in the parties to the contract should have the concurrence of all those who were interested in the transaction. But in turbulent times reason generally confines her teachings to

the stronger side. The lords were able to enforce all these principles against their tenants; but the consent of the tenant to any change of his lord seems to have been restricted to the single case of voluntary alienation. In this case the attornment of the tenant was always required; and the ceremony, long after the military tenures had been extinct, still continued to vex conveyancers. The consent of the lord was soon regarded as a mere matter of purchase: and thus the various transfers and devolutions of the estates were the occasion for certain additional payments to the lord. As each mesne lord enforced those rights against his immediate vassals, so he was himself the prey of the lord next above him in the feudal scale. Thus in England, of which alone I now speak, the various lucrative incidents of tenure formed no inconsiderable item in the Royal revenue. I am now concerned with the rights of the Crown only, and not with those of any mesne lords. It is therefore unnecessary to discuss the history, interesting though it be, of the alienation of land. It is enough that no tenant of the Crown could alienate even a part of his land without the Royal license. *Magna Charta*, however, authorized alienation, if a sufficient margin were left for securing to the lord his services—that is, as it was construed, to the extent of one-half of the fee. Ultimately it was settled that an alienation without license to any greater extent should not cause a forfeiture, but that a reasonable price should be paid to the King. This fine was fixed at one year's value of the land;* but it was understood that a license to aliene might be obtained on payment of only one-third of that amount.

In early times the question of fines upon alienation was far inferior in practical importance to the question of

* 2 *Inst.*, 67.

reliefs. There was in those days little opportunity for buying or selling land. Those who had land seldom thought of parting with it ; those who had it not had seldom any means of buying it. But since military tenants must die, the question continually arose by whom and on what terms was the vacant fief to be filled. For a long time there was a contest between the natural tendency to render property hereditary and the interest of the lord based upon the theoretical principles of the original military organization. On the death of the vassal the lord was entitled immediately to take possession of the land ; and he was then free to select at his pleasure a new tenant. Custom, however, soon established that the new tenant should be the heir of the deceased. It was admitted that the lord should, by way of precaution against intruders and to secure his due services, take immediate possession of the vacant fief, and apply its profits to his own use ; but that the heir might at any time within a year and a day assert his claim. The difficulty was as to the terms upon which that claim should be admitted. The Conqueror, following the analogy of heriots, fixed a scale of reliefs according to the rank of the claimants, and required them to be paid in arms or other munitions of war. William Rufus insisted upon arbitrary reliefs, and thus, in effect, compelled every heir to re-purchase, or, as it was then called, redeem his property. Notwithstanding certain amending provisions in the Charter of Henry the First, the dispute continued with more or less bitterness during several reigns. At length, when these feudal exactions had become intolerable under the vexatious tyranny of John, the settlement of the question of reliefs appears in the very front of *Magna Charta*. The amount of relief was ascertained, and was fixed, in effect, at a sum equal to twenty-five per cent. of one year's income upon the then annual value of the inheritance, according to the

rough computation which assigned equal values to all Earldoms, Baronies, and Knights' Fees respectively. But, in addition to this relief, the King had the peculiar privilege of *Primer Seisin*, or of one whole year's profits of the lands, if the heir were of full age and the lands were in immediate possession, and of half a year's profit if the lands were in reversion expectant on an estate for life. The heir was allowed a year and a day to sue his livery, until which time the profits belonged to the Lord. It was settled, therefore, in favour of the King (for *Primer Seisin* did not belong to any inferior lord) that this suit should, on an average, be taken as complete at the expiration of the year allowed, but not sooner.*

If, on the death of the vassal, the heir were under age, the doctrines of relief did not apply. A helpless child could not perform the duties of a military tenant; and yet the lord ought not to allow the child of his trusty servant to be wronged. The infant heir thus became the ward of the lord, or, as in his new relation he was styled, the guardian in chivalry. This wardship consisted in the custody of the person and the lands of the ward until the ward had attained the age, if a male, of twenty-one, or if a female, of fourteen years. In the latter case the lord might retain the lands of an unmarried ward for two years longer. The guardian was supposed to provide for the maintenance and education of his ward, but was not subject to any account of the profits. When the period of wardship expired, the ward might sue out his livery, or *ouster-lemain*; that is, the delivery of his lands out of the hands of his guardian. For this proceeding a fine amounting to half a year's profits was usually, although it seems illegally, charged; and the ward, on thus arriving at man's estate,

* 1 Stephen, *Com.*, 182.

was also required to take out his knighthood, or to pay the inevitable fine for his neglect.

These provisions as to wardship, although in their original construction, and apart from their subsequent abuse, sufficiently complete for the case of male heirs, did not fully meet the case of females. A woman could not herself perform military services; and in her choice of a husband she might not always be sufficiently patriotic. It was reasonable, then, that the King should claim at least a negative voice in the marriage of his female tenants. For the same reasons on which he might insist that his license should be obtained for alienation, he might also insist that his license should be obtained for marriage. In either case a stranger would be introduced upon his lands; and his consent to such an admission was indispensable. But in this case, even still more than in the case of the other feudal incidents, the abuse soon became predominant. Advantage was taken of the use of the general term "heirs" in *Magna Charta* to extend by a forced construction the incident of marriage to male as well as female heirs: and at length every ward was obliged either to accept the proposed alliance, if it were with a person of equal rank, or to pay the full amount which the lord might have obtained for such a marriage.*

If the tenant died without heirs, the land necessarily reverted to the grantor. In such circumstances the fief was said to escheat, or fall in, to the lord; and the officers by whom inquiries relative to the heirship of the tenants of the Crown were made were called escheators. Hence we derive one of our most familiar names for open dishonesty; and the silent evidence of language affords conclusive proof of the character of

* 1 Stephen, *Com.*, 185.

these inquisitions and the spirit in which they were pursued. It is almost superfluous to observe that on a breach of any of the conditions of this tenure a forfeiture of the land accrued, and was generally enforced with rigour.

Such were the incidents that naturally flowed from the military tenure, so far as they related to any change of tenancy. But there was another incident which is to us of permanent interest. It was the duty of the tenant to assist his lord—in war, at the peril of his own life: in peace, with his sympathy, his advice and his purse. These obligations had at first, perhaps, no legal existence. They belonged to the field rather of moral sentiments than of coercive law. But the warm sympathy between personal friends under which such duties seemed merely things of course could last no longer than the friendship. The lords became more exigent in their demands: the tenants grew less willing to meet them. At length a compromise was effected. It was agreed that in three cases, and in none other, aids should be considered of legal obligation. The tenant was bound by law to pay an aid towards the ransom of his lord from captivity; towards the knighthood of his eldest son; and towards the marriage of his eldest daughter. The first of these aids was only levied when the contingency had actually occurred. Once only in our history, when Cœur de Lion pined in the Austrian prison, was this aid required by the Crown. But the aid for the knighthood was payable when the young heir had attained his eleventh year; and it was time to think about the trousseau when the fair daughter of the house had completed the mature age of seven. In all these cases it was strictly provided that the aids should be reasonable; and the vagueness of this term gradually disappeared.

In addition to these ancient and reasonable aids the lord might still ask, and the tenant might still grant,

further assistance. Every such grant, however, was of pure free will. It was a gift, not a duty. It was, therefore, usual that such gifts should be preceded by a request and a statement of the lord's needs. It was competent for the vassal, if he thought fit, to refuse such request. It was not competent for the lord under any colour of right to insist upon such aid ; or, whatever might be the exigency, to take his vassal's property without that vassal's consent. The granting, therefore, of aids was one principal object for which the King summoned his tenants. Such aids were seldom granted except upon conditions ; and at the same time every attempt to obtain this pecuniary assistance by any other means than by grant, and to convert an extraordinary supply into an habitual impost, was fiercely resented. Such, then, was the origin of Parliamentary taxation ; such the beginnings of Parliamentary redress of grievances ; and such the circumstances out of which grew the point of honour in Anglican liberty,* the right of self-taxation.

§ 4. The military tenures and their incidents once had a healthy and vigorous life. They grew out of a certain condition of society ; and they were adapted to that condition, and satisfied its requirements. But the more complete is the adaptation of any institution to one social state, the more marked is the unfitness of that institution for a different state. The food and the clothing that were suitable for the child would not recruit the strength or suit the purposes of the grown man. In the time of Henry the Second the practice had begun of commuting for money the personal services of the Knights. In the time of Richard the Second the

Military tenures converted into socage.

* See Burke's *Works*, iii. 253.

old method of recruiting had broken down. When Henry Tudor ascended the throne, little of Feudalism was left save its burthens. These burthens were not likely to be lessened by that King. He found the Royal revenue in extreme dilapidation; and both his necessities and his temper urged him to repair it. Advantage was accordingly taken of every claim that the Crown could make; and many claims are said* to have been made without any colour of right to support them. We have indeed but one side of the story against Empson and Dudley, and know not what defence these officers might have set up. But it is not difficult to understand what a host of enemies their enforcement of dormant claims must have caused; and without attributing to them any scrupulosity, the proprietary rights of the Crown were then so perplexing, and the state of the Crown property after the various grants and resumptions of the fifteenth century was so confused, that their conduct may well have been far less indefensible than history reports. In the reign of Henry the Eighth, to whose zeal for the lucrative fruits of his tenures we are indebted for the Statute of Uses,† arrangements were made for the systematic enforcement of the Royal rights by the erection of the Court of Wards and Liveries. Under this tribunal the oppression of the tenants of the Crown continued unabated. The heir who during the whole of his infancy was kept out of his inheritance,‡ and who found his woods cut down, his houses in ruin, his stock wasted and gone, his lands exhausted, under the parental care of his Royal guardian, was obliged to pay the profits of another half-year before he could be put into possession of his devastated property. He was also obliged either to marry, while yet under age, the person to

* Bacon, *Works*, vi. 218. † Amos, *Statutes of Henry VIII.*, 116.
‡ 1 Stephen, *Com.*, 190.

whom his land was sold, or to be the debtor of His Majesty for the full amount which he might have brought in the matrimonial market. If he wished to have the privilege of choosing his own wife, he must pay for that luxury ; and the price was fixed at twice his matrimonial value. The untimely and expensive honour of knighthood served to make his poverty more completely splendid : and if he sought to extricate himself from these manifold embarrassments by the sale of a portion of his lands, he had to purchase this sorrowful privilege by an exorbitant fine for alienation.

Such was the position of the military tenants at the accession of the House of Stuart. The constant and uncontrollable extravagance of James, his consequent embarrassments, and the difficulty he experienced in obtaining Parliamentary supplies, did not lead to an abatement of the Royal claims or to an improved method in their enforcement. On the contrary, pretensions which for nearly a century had been unknown were now revived. The old aid for making the eldest son a knight was paid for Prince Henry ; and the corresponding aid for the marriage of the eldest daughter was claimed, if it were not actually paid, for the Queen of Bohemia. No such aid had been heard of since the knighthood of the eldest son of Henry the Seventh, or since the marriage of Margaret Tudor with the great grandfather of James. So obsolete had these aids become, for Henry the Seventh had compounded them for a grant of thirty thousand pounds, that the Chancellor was obliged to hold many consultations on the subject with the judges and the officers of the Exchequer* respecting the proper mode of their collection. Commissions were at length issued into all the counties of

* Lord Campbell's *Chancellors*, ii. 232.

England, and inquiries, which could not fail to be irritating, were made under them into the tenure of all lands and their ancient and present value. James revived, too, a practice of which Elizabeth had on one occasion set the example,* of requiring all persons who held estates in chivalry to the value of forty pounds to take out their knighthood. Those who considered this honour too troublesome or expensive for their means were entitled to compound for their absence by a fine ; and both in James's reign and in that of Charles the First considerable sums were thus raised. It was natural, therefore, that some attempts to remove this evil should be made. Accordingly the first Parliament of King James proposed to come to terms with the King for the abolition of purveyance and wardships. The proposals† were not on that occasion very favourably received, but were in 1610 renewed with greater prospects of success. But although at one time a satisfactory result appeared probable, the negotiation was ultimately broken off in mutual displeasure. In 1645 the Lords and Commons passed an Ordinance for the abolition of the Court of Wards and Liveries. At the treaty of Newport Charles the First had consented to abandon this portion of hereditary revenue for a fixed annual sum of £100,000 ; and subsequently Barebones' Parliament confirmed the Ordinance of 1645. It was, indeed, one great advantage which resulted from the Commonwealth that it interrupted bad habits of long standing, and established precedents of which the utility was apparent even to the Cavaliers. After fifteen years' suspension of these oppressive prerogatives, their re-establishment was almost impossible. The Commonwealth, too, furnished a suggestion by which all difficulties as to terms were removed. An excise duty upon beer and other liquors

* Hallam, *Const. Hist.*, ii. 9.

† See, for the value of these incidents, Gardiner's *Hist. of Eng.*, i. 455, 470.

had formed part of the Republican ways and means; and the Cavaliers considered that the continuance of this duty would have the very considerable merit of removing a heavy burthen from their estates at the expense of other people. Accordingly the whole system of feudal tenures and their incidents was abolished;* and "in full and ample recompense and satisfaction" thereof, an hereditary excise duty, with ample powers for its collection, was granted to His Majesty.

By the same statute, and under the terms of the same agreement as that which abolished the military tenures, there fell one of the oldest and most vexatious nuisances that had, under the name of prerogative, so long oppressed the people. Wardships and marriages brought with them in their fall the not less odious grievances of purveyance and pre-emption. The abuses of these privileges seem to be so inherent in their nature that, although not less than thirty-six statutes sought to control them, and although the records of Parliament were full of complaints and petitions and replies upon the subject, they continued with almost unabated vigour to the time of the Commonwealth. Scarcely an act of extortion was unpractised by these purveyors. They would cut down ornamental timber, they would take a favourite riding horse, they would summon five or six times as many carts as they required, and would select tired horses, in the hope of having their claims bought off. They caused valuations to be made by their own nominees, and often forced the owners to accept a fraction of their just demands. They seldom paid ready money; they committed to prison the constables who assisted those who opposed their illegal proceedings. All these abuses we read of in the time of James the

* 12 Car. II. c. 24.

First.* In earlier times still less ceremony was used. We read of peasants deserting their villages and flying before the approach of the King as if he were an invading enemy, and of men driven to an insurrection in despair of obtaining from an empty exchequer payment for the tallies given them for their goods. It surely was no bad bargain for the nation to purchase, even if it had been at the cost of twice the excise, exemption from such a grievance. Nor must it be forgotten that something more than a mere burthen on land was released by this Act of Charles the Second ; and that although the military tenants obtained without any consideration on their part a great benefit, the whole of the price of the surrendered prerogative was not due by them.

§ 5. Besides those lands which were granted or assumed to have been granted to private owners by the Crown, and in which the King retained only the lordship and the right to the proper services and other incidental advantages, there were, as I have said, those great possessions which had not yet been alienated from the Crown, and which rendered the King the wealthiest proprietor in the realm. These lands, as they were described in Domesday Book, including more than 1,400 manors and almost all the principal towns in the kingdom, formed the Ancient Demesne of the Crown. The manors, like the lands of other great proprietors, were occupied by serfs annexed or appendant to them, or by persons holding by a servile tenure. These tenants did by their tenures, says Lord Coke,† manure, till, and reap the corn upon the King's demesnes, mowed his meadows, repaired his fences, and

Ancient demesne.

* See Barrington, *Ancient Statutes*, 7, 183 ; Hallam, *Middle Ages*, iii. 148 ; Gardiner, *Hist. Eng.*, i. 190.

† 2 *Inst.*, 542.

performed all necessary things belonging to husbandry upon the King's demesnes. This practice prevailed both before the Conquest and after the two succeeding reigns.* The rents were always paid in kind ; and each county sent up from its demesnes its appropriate productions, wheat or cattle or sheep or horses or provender. In the reign, however, of Henry the First a change was made. The tenants complained bitterly of the hardships they endured in the conveyance of their goods from their homes to the Royal stores. The King was engaged in continental disturbances, and was thus sensible of the greater convenience to him of money over bulky and perishable commodities. Accordingly, with the advice of his great men, the King appointed commissioners to examine the various farms and to estimate in terms of money the amount of their proper contributions. In accordance with this valuation the payments in kind were converted into fixed pecuniary rents ; and these sums the sheriff of each county was required to collect. Tenure in Ancient Demesne thus became a superior kind of copyhold. It brought with it certain privileges and immunities which were in early days regarded as of no little consequence.† The King's tenants had their own court, and their own procedure ; although severally distrained for other services, they were permitted to join in a common defence ; and they were exempt from tolls at fairs and markets, and from taxes imposed by Parliament unless specially named ; from contributions to wages of Knights of the Shire and from service upon juries. To this tenure, which even still survives, Bracton‡ gives the name of villein socage. It was analogous to villeinage in the nature of its services, and to socage in their certainty. In cities and towns which formed part of the ancient demesne,

* *Dial. de Scac.*, lib. i. c. 7 ; Madox, *Hist. Ex.*, ii. 381.
† 4 *Inst.*, 269. ‡ 1 Stephen, *Com.*, 210.

and from their example apparently in other towns, this tenure was known as burgage tenure.*

The demesne men were not subject to the reliefs, aids, and other incidents of free tenure. But they were liable to a peculiar and still heavier burthen. That contribution to the necessities of their lord, which free tenants paid under the name of aid, was paid by the demesne men as tallage. In the latter case no less than in the former the payment was nominally recognized as a gift; but the various securities, which custom and afterwards positive law had provided in the case of the aid, did not extend to the demesne lands.† As in the case of the aids, the tallages were fruits of tenure; and were accordingly paid to the tenants' immediate lord and not to any other person. The King therefore had no exclusive privilege of tallage, and was not entitled to charge any other person except his own men. Other men paid their tallage to their own lords. In many cases, however, the right of private tallage might be directly traced to a Royal Grant. If a grant of a demesne manor or town were made in terms sufficiently large, the original liability of that manor or town to tallage remained as before. The grantee was therefore entitled to tallage his men, at the same time and to the same extent as the King set tallages in his demesnes. It was, however, the practice,‡ when the King demised any part of his demesne or granted a temporary estate in it, to reserve the tallages to himself and his heirs. Under this reservation tallages were levied upon land not at the time included in the ancient demesne. In other cases inferior lords tallaged their demesnes as they thought fit. We have, of course, less information respecting these private tallages than respecting those which are entered in the public records.

* Littleton, lib. ii. c. 10, s. 163. † 2 *Inst.*, 233; Madox, *Hist. Ex.*, i. 645.
‡ Madox, *Hist. Ex.*, i. 728.

It would not be unreasonable to conjecture that private lords would be keener in the pursuit of their interest, and more rigorous in enforcing it, than the King. This probability is confirmed by the evidence of many extant records. From these documents * it appears that men over whom inferior lords claimed the right of tallage sought to establish in the King's Courts their exclusive liability as tenants of the Crown. As the tallage of the King was preferable to that of a subject, so the condition of the free tenant who paid an aid was better than that of the demesne man who was liable to tallage. We find, accordingly, many complaints of improper assessment. The complainants insist† that they ought to pay with the men of the county, whereas the King's officers have assessed them to pay with the men of the town. We find also a special provision in the Charter of Edward the Third to the city of London‡ that the citizens shall be taxed and contribute with the community of the realm as men of the counties and not as men of the cities and boroughs. This privilege had previously been in dispute between the city and the King. In the thirty-ninth of Henry the Third,§ when the King, by the advice of his council at Merton, tallaged his demesnes, the city, although willing to give by way of aid a considerable sum, positively refused to be tallaged. After much controversy with the officers, the citizens came before the King and his council, and then it was disputed whether this should be called a tallage or an aid. The King ordered search to be made whether the city had formerly paid tallages to the King or his ancestors. The precedents were found to be unfavourable to the city; and "on the morrow the mayor and citizens came and acknowledged that they were talliable, and gave the King three thousand marks for tallage." It is

* Madox, *Hist. Ex.*, 756. † *Ib.*, 723. ‡ *Lib. Alb.*, 746.
§ Madox, *Hist. Ex.*, i. 711.

remarkable, too, that as long as the different parts of the House of Commons made separate grants, the subsidies of the cities and towns were always greater than those of the Lords or of the Knights. The reason of the separate grant seems to have been that each grant was in lieu of a separate claim. And the reason of the difference in the amount of the grant was that the burthen of tallage was heavier than the burthen of aids.*

The right of tallage extended not only to demesne lands, but to all lands which the King had in his own hands.† In certain circumstances, and for certain purposes, lands granted in fee reverted to the King. Such a reversion took place not only in escheats and forfeitures where the estate was extinguished, and the land therefore returned to the donor, but also in wardships. The death of a military tenant in fee while his heir was an infant seems to have operated as a suspension though not as a destruction of his estate.‡ During the minority of the heir the land was held to belong to the King, discharged, so far at least as the profits were concerned, of the estate. But upon his coming of age, the estate revived ; and the heir was entitled to obtain on payment of a fine a re-conveyance of his father's lands. The lands thus in the hands of the King, whether the estates in them were extinguished or were merely in abeyance, were regarded as parts of the Royal demesnes ; and were consequently subject while in this condition to tallage and not to aids.

§ 6. I have said that in earlier times a marked distinction was taken between the private lands of the King and those which were provided to support the dignity of the Crown. Although he exercised over the

Alienation of Crown lands.

* 1 *Lords' Report*, 217, 306. † Madox, i. 700.
‡ See Madox, i. 299.

former all the rights of a private owner, he could not dispose of the Crown lands at his own uncontrolled pleasure. In various places in Domesday Book lands are described as demesne lands of the King belonging to the kingdom.* For the alienation of such land the consent of the Great Council was probably, at least at first, required. Whether with or without this consent, the Conqueror seems to have exercised the right of granting away land that belonged to the kingdom. But certainly at a later period the distinction between the lands of the Crown and the lands of the kingdom was completely effaced. It became a maxim of English law that all lands and tenements in the King's possession, even though he held them before his accession, and had acquired them from ancestors who were not royal, belonged to him in right of his Crown, and descended with it to his successor. From this mixture of capacities two curiously opposite consequences followed. Since these lands belonged to and followed the Crown, the King could not devise them. But since they were private property, the King, without any advice from his council or other interference, except the assistance of the officers by whom the grants were prepared, might during his life dispose of these lands in any way he thought fit. This power our Kings were not slow to exercise. Sad havoc was made under the Plantagenets of those vast estates which the Conqueror had held. Not unfrequently the lavish grants of one reign were forcibly resumed in the next. Of those acts of resumption, of which not less than thirty were enacted, the last, so far at least as grants in England were concerned, was that which in the year 1485, immediately after the battle of Bosworth,† annulled the donations of the Kings of the House of York. Henry Tudor, indeed,

* Allen, *On the Prerogative*, 153. † Macaulay, *Hist. of Eng.*, v. 33.

earnestly sought to repair the wasted resources of the Crown; but all his savings and all his acquisitions and the greater part of the vast plunder of the monasteries, amounting, it is said, to thirty millions' worth of land, were lavished by his magnificent son. During the short reign of Edward the Sixth estates to the value of not less than five millions of our present money, and probably of a still greater amount, were absorbed by the Lords of the Council and their friends.* In the reign of James the First the Crown lands yielded a revenue of less than £67,000 a year; and James continued to waste them with even greater prodigality than his predecessors. The pecuniary difficulties to which James's extravagance reduced him led to the sale of large portions of the Crown lands. During his reign about three quarters of a million sterling seem to have been paid at these sales. But if James reduced the property of the Crown, he established a precedent for the correction of the evil. He attempted to guard himself against his own weakness by putting the Crown lands into entail.† He engaged not to part with any lands without the consent of a certain number of his Privy Council. This precaution seems to have checked the practice of lavish donations of land, although it did not check the grants of money for which lands were sold. But it was not until the reign of Anne, after almost all the Crown lands had been granted away, that a check was placed upon the unlimited control of the Sovereign for the time being over the property of the Crown. The prodigality with which William the Third had rewarded his Dutch followers had excited all the jealousy of Englishmen. On more than one occasion Bills of Resumption were spoken of, and even introduced; and they would probably have been

* Froude's *Hist. of Eng.*, v. 467.
† Gardiner, *Hist. of Eng.*, i. 441.

passed, were it not that the not less lavish grants since the Restoration could hardly in such a measure be overlooked. But in the first year of the new reign* the power of the Crown over its lands was reduced to the grant of a lease, except for building purposes, for thirty-one years or three lives, and with the reservation of a reasonable rent. The remnant of the Royal estates was thus secured, if not from mismanagement, at least from improvident alienation. The same century witnessed, by a singular revolution in policy, a recurrence† to the ancient practice of the Anglo-Saxons respecting the property of the King. The Crown lands were virtually restored to the public; and the King obtained‡ the right of acquiring landed property by purchase, and of devising it like a private person.

* 1 Ann, St. i. c. 7. † Allen, 155.

‡ 39 and 40 Geo. III., c. 88.

CHAPTER XIII.

THE REVENUES OF THE CROWN.

§ 1. In the earlier periods of our history the difference between the King and any of his subjects seems to have been one of degree rather than of kind.* The King's weregild, or the price of his life, was about six dozen times that of an ordinary free man. His allotment of land was proportionately greater than that of other men. His peace, or guarantee of protection, was more important than the peace of any other lord; and its violation brought with it heavier penalties. Even when with the gradual growth of Royalty the Chief Lord of the Angles became the King of England, when his peace was co-extensive with the realm, when he no longer "sounded in damages" but was surrounded by the terrible sanctions of treason, the means by which the Royal state and dignity were supported remained unchanged. The King was the first landowner in the kingdom. He held in right of his Crown great estates, which descended indeed with the Crown, but of which during his life he was the absolute proprietor. These lands were the main source of his personal revenue. His expenses were much more limited than in the course of national development they became. His Courts of Justice were self-supporting, or were perhaps a source of revenue. The labour

The ordinary revenue of the Crown.

* See Kemble's *Saxons in England*, i. 153, ii. 33.

of the country people for three days before harvest, and for three days after it, was sufficient for the construction and maintenance of public works. For military purposes, as we shall see, other means were provided. There only remained then the maintenance of the Royal family and household. The officers of the household were at that time the great officers of state. The Lord Treasurer received the rents of the Royal estates. The Lord Steward and the Lord Chamberlain presided over the Royal household. The stables were under the charge of the Lord Constable and the Lord Marshal. The country houses of the King were castellated; and their keepers were in some sense military commanders. In these circumstances, as Adam Smith* observes, the rent of a great landed estate might upon ordinary occasions very well defray all the necessary expenses of Government.

There was another prerogative which must be taken to belong to the personal and not to the political revenue of the Crown, and which, although it brought little profit to the King, bears from its abuses a conspicuous place in our history. This was the prerogative of purveyance. In early times the wants of the Royal household were supplied from the produce of the Royal demesnes. The King moved from one manor to another, partly for the better performance of his Royal duties, and partly from humbler considerations of economy.† Each estate had its own storehouses, and it was more convenient to bring the Court to the supplies than the supplies to the Court. After the conversion of these supplies into money payments, a continual market was held at the King's Gate; and an officer,‡ whose title, Clerk of the Market of the King's House, long survived his active duties, was appointed to superintend it. This system, however,

* *Wealth of Nations*, b. v. c. 2. † Kemble's *Saxons*, ii. 59.
‡ 2 *Inst.*, 542.

was beset by various practical inconveniences, and soon gave way to a more summary method of supply. When the means of communication between different parts of the country had practically no existence, each district raised its own food and had little or no connection with any other district. In such circumstances the unexpected presence of the Court with its host of retainers must have been to the district thus honoured a cause of serious embarrassment. Even if payment were made for all the provisions that the visitors required, the district would probably experience considerable inconvenience from such an abstraction from its ordinary consumption. The immediate effect of so great an addition to the local demand would of course be a rise in prices. The difficulty of obtaining the requisite supplies on any terms, and the necessity of paying for them exorbitant prices, must have been both inconvenient and vexatious. The King therefore claimed the right of the preferential and compulsory purchase of provisions and other needments for the use of his household, and of the impressment of horses and carriages to do his business on the public roads in the conveyance of timber, baggage, and other supplies. The amount of compensation was determined by the Royal officers. A distinct provision was thus made for the personal and domestic expenditure of the King. The King, like his nobles, had great landed estates. From the profit of these estates he, like any other great lord, supported his rank. In consideration of his kingly state he possessed the peculiar privilege of purchasing commodities on his own terms, and of using in his Royal progress the services and the property of his subjects. These were the obvious resources of an undeveloped society; but, as we shall see, their influence was largely felt when the social development became distinct.

The profits of the Royal manors and lands could not

suffice for, and were not intended to supply, the means for public defence. For the safety and protection of the nation against enemies the Law and Constitution of England made special provision.* When the Conqueror, under the peril of a Danish invasion, organized on feudal principles his kingdom, he formed a territorial register, of which the unit was a knight's fee. Each of these portions of land was, as we have seen, charged with the duty of providing on demand a mailed and mounted warrior with his proper retinue to attend during forty days in each year at his own cost upon the King in his wars. By these means the great feudatories of the Crown were responsible, at the peril of their estates, for the presence and the support in the field of an army of sixty thousand men. The Cinque Ports and some other towns held their lands by an analogous tenure; and were bound to furnish, as the condition of their possessions and privileges, a prescribed number of ships or of men. Next to these specific services the King possessed the lucrative fruits of tenure and the profits of his various minor prerogatives. In addition to these resources, and with more special reference to maritime purposes, he enjoyed, apart from any customs granted by Parliament, the ancient customs on importations of merchandise, the Grand Customs of the Mark and the Demi-Mark upon wool, woolfells, and leather, and the prisage or one tun of wine before the mast and one tun abaft the mast of every ship. All moneys derived from these sources or coming to the Crown by virtue of any prerogative were applicable so far as they could be extended to the public use.

§ 2. Such were the ordinary revenues which the law placed at the disposal of the Crown, both for the support of

* See 1 *State Trials*, 500.

its dignity and the discharge of its public trusts. If on any occasion these revenues should be deficient, a special method was provided for obtaining an extraordinary supply. The King might appeal to the loyalty of the various classes of his subjects. He might ask his free tenants for an aid. He might invite the contributions of the clergy. He might tallage his tenants, whether townsmen or otherwise, in his ancient demesne. But the assistance thus rendered was always described as a gift. Even the tallages, which certainly became compulsory, are included under the name of *Donum*.* But a gift implies at least the consent, if not the spontaneous action, of the giver. The King, if he desired these aids, was bound to ask for them. He could obtain them not by compulsion of law, as he might collect the fruits of his tenures, but only by persuasion. When therefore he needed such assistance, he was bound both to obtain the concurrence of those upon whom the burthen was to fall and to provide means for ascertaining and proving that concurrence. What these means were I shall subsequently consider. For the present they may be described as the consent of Parliament. According to the exigency of the case and its sense of the importance of the public service for which further means were required, Parliament voted supplies and levied them by taxes. To this source of supply the law enables the King at all times to have recourse, for it places in his hands the power to summon a Parliament where and as often as he pleases.

The extraordinary revenue of the Crown.

It needs scarcely be repeated that the body which was thus asked to grant additional supplies to a King for whose ordinary wants the law had already made ample

* Madox, *Hist. Ex.*, i. 694.

provision was placed, if it desired to extend its authority, in very favourable circumstances. The burthen of proof rested with the Crown. Parliament might reasonably ask for explanations both as to the nature of the circumstances which led to this demand, and as to the cause which rendered the Royal revenues unequal to meet or, at least, partially to meet these circumstances. It might criticise the financial arrangements of the Crown; and partly from its inherent power to advise, and partly in reply to the application made to it for funds, might both insist upon the merits of economy and indicate its direction. Further, when a favour was thus asked of it, it might take the opportunity to become in its turn a petitioner. Before proceeding with the question of supply it might lay its own grievances at the foot of the Throne. Nor in the earlier times of our Parliamentary history did our Kings show any reluctance in coming to a very explicit understanding with their Parliaments. Many of our best laws, as Mr. Hallam* observes, even *Magna Charta* itself in the form in which as confirmed by Henry the Third it now stands in the front of our Statute Book, were "in the most literal sense obtained by a pecuniary bargain with the Crown. In many Parliaments of Edward the Third and of Richard the Second this sale of redress is chaffered for as distinctly and with as little apparent sense of disgrace as the most legitimate business between two merchants would be transacted." Thus it was literally as the price of their grants that the Commons obtained their present power of the fullest control over every department of the Executive Government. But under our earlier system the revenue, from whatever source it was derived, was still actually, and not in trust only, the King's revenue.

* *Middle Ages*, iii. 161.

It was paid into his Treasury. It was expended under his directions. It was applied to such purposes at such times and in such manner as he thought fit. There was no appropriation, and there was no account. The distinction between the profits of the Crown lands and the other hereditary sources of revenue could only have been of practical importance in determining the propriety or the amount of a Parliamentary grant. When that grant was made, its proceeds were treated in the same manner as if they had been ordinary revenue. The amount was collected by the King's officers, was kept by the King's officers, and was expended by the King's officers. With none of these matters had Parliament any concern. Its duty was to find the money required for the King's service. The particular services to which the money so found should be applied, and all other questions connected with its expenditure, rested with the Crown.

§ 3. Several circumstances tended in the thirteenth century to depress the importance of the hereditary revenue and to increase the Royal disposition to have recourse to Parliamentary grants. On the one side the amount of the hereditary income rapidly diminished; on the other side the expenses of the Crown largely increased. Henry the Second had indeed regained most of the manors which the Conqueror had won and which had been dissipated by his successors; and had even increased, by his great Continental possessions, the wealth and the splendour of the English Crown. But this prosperity was of brief duration. The troubles of the latter part of Henry's reign, the extravagance of his sons, the exigencies of Richard's crusade and of John's profligacy, the long imbecility of Henry the Third, all these causes left to Edward the First a much diminished income. The great

Taxes substituted for rents.

possessions of the Plantagenets in France led to frequent collisions between the King of France and his Royal vassal. After the loss of Normandy, Acquitaine and Gascony were sources of expense rather than of revenue. Most of Edward's reign was passed in a double series of wars—the one for the consolidation of his own kingdom within the limits of the island, the other for the prevention of a corresponding attempt by Philip in France. For such wars the feudal militia, which was designed for defence rather than aggression, was ill adapted. During a great part of his reign the resources of his foreign possessions were in the hands of the King of France; and the war which he waged for their restoration was very costly. Edward freely used mercenary troops, and subsidized his foreign allies. He was thus in constant need of pecuniary assistance; and the necessity of a better organization of his kingdom, both for financial and for general purposes, was brought prominently before him. He was ready to admit that "what touched all should be approved by all;" but he also thought that "reason required that common dangers should be met by common subsidies."* He seems accordingly to have adopted as the basis of his domestic policy two leading principles. One was the extension of the system of tenancy *in capite*, or immediate tenure from the Crown; the other was the substitution of Parliamentary grants for his seigneurial scutages and aids. By these means he hoped to extend the area both of pecuniary contribution and of personal service. He declared, in reply to a petition presented in Parliament to him concerning certain grants of land,† that he would not admit a middle person. The Rolls of Parliament contain many complaints of attempts on the part of the Crown‡ where lands held of mesne lords

* 23 Edw. I.; 11 Edw. III.; Parry's *Parliaments*, 57, 106.

† 1 *Rolls of Parl.*, 51 c. ‡ 1 *Lords' Report*, 333.

became forfeited to the Crown, or vested in it by any title, to grant these lands to others to hold of the King in chief, and not of the mesne lord. Edward sought to compel the personal military service of many who were not his tenants and who owed him no such service. Such an attempt was vigorously resisted.* It struck, indeed, at the very root of the distinctions of tenure, and tended to make all persons who held lands by sub-infeudation contributory to military service, and not those only who held by military tenure. A still more decided proof of this policy is found in the Statute† *Quia Emptores*, by which the practice of sub-infeudation was abolished, and the grantee was required to hold of the original lord and not of the grantor.

Many causes tended to the adoption of the Parliamentary grant as a substitute for the seigneurial aids and commutations. The machinery for its levy was in actual operation. The consent of the contributors was needed in the case of a voluntary aid: and the same principle was easily extended to the compulsory aids and to scutage. The ordinary aids were subject to much evasion, much uncertainty, and much dispute. Many tenants denied that they held anything of the Crown. Many more returned the rents of their holdings at an amount far below the truth. Even in cases where the right of the Crown seems clear, considerable difficulty was found in enforcing it.‡ Apart from any wilful evasion, great confusion prevailed respecting tenures. It was often doubtful of how many knights' fees a tenant had been enfeoffed, and, consequently, what were the claims of the Crown upon him. In the case of ecclesiastical persons this uncertainty was especially frequent.§ The origin of many ecclesiastical endowments was so remote that the mode of their enfeoffment was unknown.

* 1 *Lords' Report*, 387.
† 18 Edw. I. c. 1.
‡ Madox, *Hist. Exc.*, i. 641.
§ *Ib.*, 647.

It was often, too, a question whether certain bishops or abbots held by military service or in frankalmoigne. The confusion seems to have been increased by the frequent removal of documents and records belonging to the Exchequer. One of the most remarkable of these changes was the removal of the Exchequer to York by Edward the First. It was not until the reign of his grandson that this department was brought back to Westminster, where it has ever since been established. Many documents are supposed to have been lost during this sojourn at York; and the Lords' Committee observes that the conduct of its inquiries was from the state of the records more difficult in the Exchequer than in any other repository.* In these circumstances a grant by a representative assembly presented considerable advantages. The grant was often made upon all the fees, whether recognized or not, held by each tenant. Thus all uncertainty as to the extent of the contributory land was removed in favour, for the time at least, of the Crown.† The rate also was fixed by the grant; and thus there was no room for dispute, such as in the levy of compulsory aids was of common occurrence, as to the number of marks at which each knight's fee should be charged. The vote, too, of the majority of the Assembly was held to bind its dissenting or absent members. An express provision to this effect was contained in the Great Charter of John; but was omitted, along with the other provisions relating to the Financial Assembly, in the Charter as confirmed in its present form by Henry the Third. But there is on record a singular case which shows that such a provision was far from superfluous. Peter, Bishop of Winchester,‡ was charged with 159 marks towards the first escuage in the reign of Henry the Third;

* 1 *Lords' Report*, 334.

† Madox, *Hist. Ex.*, i. 608. ‡ *Ib.*, 675.

but it was testified at the Exchequer by Hubert De Burgh, Chief Justiciar, William Briewerre, and other Barons that the Bishop of Winchester never consented to the granting of the said escuage but constantly opposed it; and that this was admitted to be true by William Mareschall, Rector of the King and Kingdom, and by the rest of the King's council. Whereupon it was adjudged at the Exchequer that the Bishop should be discharged of the 159 marks. A further advantage to the Crown was the extension of the area of taxation. The tenants in chief alone contributed to the feudal aids, and they were entitled to reimburse themselves from their sub-tenants. But a Parliamentary grant seems, if not at first certainly within a short period, to have extended to all freeholders, without reference to their tenure. The effect of this extension was especially apparent in towns. In the first place all towns, and not those only which held of the King, or in which the right of tallage was reserved, thus became subject to taxation. In the second place all persons in the town, whether they held by burgage tenure or not, became in like manner liable.

For all these reasons—the prevention of disputes as to the amount of charge, the prevention of disputes as to the rate of charge, the prevention of disputes as to the persons chargeable, the extension of liability beyond those classes which in feudal law were liable—Edward the First whenever an opportunity presented itself favoured the system of Parliamentary taxation at the expense of seigneurial rights. In the thirty-fourth year of his reign a remarkable instance of this tendency occurred. The King, on the occasion of making his eldest son a knight, held a Parliament, and obtained in lieu of the usual aid from the military tenants a grant of a twentieth from the cities and boroughs, and a thirtieth from the Prelates, Earls, Barons, and Knights. It does not appear that any demand was then made upon the

clergy. This exemption was not due to any general privilege of the Church. It was only a few years previously that the King had shown by the most energetic measures that in cases of public exigency the clergy possessed no immunity from taxation; and that, although the mode and the measure of the charge were in their discretion, it was their duty to contribute reasonably to the necessities of the state, and to meet common dangers by common subsidies. But this occasion was not a case of public danger; it was merely a commutation of a charge in which the clergy were not concerned. The lands that were held in frankalmoigne or in socage were never liable for the knighthood or marriage aids.* These aids were paid by the military tenants; and the payment of such an aid may have been one of the occasions on which it was customary to tallage the demesnes. Either the Common Law right would be enforced, or a grant would be accepted in its stead. The latter course was probably found to be more advantageous to the Crown and less burthensome to the contributors than the old method. Thus from the earlier part of the fourteenth century the grants of Parliament became continually a more and more important part of the Royal income. With the growth of the country the oppressive character of the feudal incidents was more acutely felt, and at the same time the amount of taxable property increased. At length the distinction between the ordinary and the extraordinary revenue has been practically effaced, and the integration of its finances has followed the integration of the nation.

§ 4. The mode in which our ancient Parliaments supplied the wants of their King when he sought from them

* Madox, *Hist. Exch.*, i. 500.

an extraordinary revenue was very simple. It consisted of Customs duties or of rates levied upon real or personal property. These taxes were granted either for life or for a term of years or for one occasion only; and were known as tonnage and poundage, subsidies, and fifteenths. Tonnage was a duty upon all wines imported, and was exclusive of the old right of butlerage and prisage. Poundage was an *ad valorem* duty of one shilling in the pound on all other merchandise. These duties were expressly declared to have been granted "for the defence of the realm and the keeping and safeguard of the seas and for the intercourse of merchandise safely to come into and to pass out of the same." They were at first granted for a stated term, usually of two years, but from the time of Henry the Fifth were renewed in every reign for the King's life. Mr. Hallam* supposes, with much probability, that they were a tacit compensation to the Crown for its abandonment of various maletolts or irregular exactions which under different pretexts it continued to extort. These duties, which† amounted in the time of James the First to one hundred and sixty thousand pounds a year, were granted with such regularity to each successive King that they seemed to be a part of the ordinary revenue. But on the accession of Charles the First the House of Commons proposed to grant tonnage and poundage for one year only. The Lords rejected the Bill as imposing an improper restriction; and the King during fifteen years collected these duties by his own authority. Notwithstanding that this power was expressly renounced and condemned by Act of Parliament in 1640, James the Second, although in somewhat exceptional circumstances,‡ acted upon it. Ultimately the duties of

History of Parliamentary supplies.

* *Const. Hist.*, i. 316. † 4 *Inst.*, 32.

‡ Macaulay, *Hist. of Eng.*, i. 452.

tonnage and poundage were in the time of George the First rendered perpetual, and were mortgaged for certain parts of the national debt. *

The other Parliamentary duties, the subsidies and the fifteenths, were seldom granted for more than the particular occasion on which they were demanded. The former seem to have sprung from the aids of the military tenants; the latter to have taken the place of the tallages of the towns. The term subsidy, although it is sometimes used in a general sense to include all general aids of whatever kind, is usually confined to an aid of four shillings in the pound on the current value of land worth twenty shillings a year and two shillings and eightpence upon goods worth three pounds and upwards. The tenths and fifteenths were the tenth or the fifteenth part of all movable goods according to a valuation made in the eighth year of Edward the Third. There was thus a material difference between the two classes of grants. The former related to the person, and was therefore uncertain until it was assessed. The latter was a charge upon the city, town, or borough according to its valuation as recorded in the books of the Exchequer, and therefore required no assessment. The inhabitants rated themselves † for the amount; or, if two towns were joined, divided in proper shares the burthen, subject to the control of the Court of Exchequer. The subsidies were collected by Commissioners appointed under the Great Seal, usually from the residents in the county in which the subsidy was levied.‡

"In former times," says Lord Coke, § "in this kind of subsidy this order was observed, that over and above the subsidy of tonnage and poundage the Commons never gave above one subsidy of this kind and two fifteens (and some-

* 2 Stephen, *Com.*, 577.
† 2 *Inst.*, 77.
‡ Gardiner's *Hist. of Eng.*, i. 288.
§ 4 *Inst.*, 33.

times less); one subsidy amounting to seventy thousand pounds, and each fifteen at twenty-nine thousand pounds or near thereabouts." He adds that in the thirty-first year of Elizabeth the Commons gave two subsidies and two fifteens "which first broke the circle." But whether from the laxity of the Commissioners or from some peculiarity in the valuation, the amount of these sums was steadily decreasing. In the beginning of the reign of Elizabeth a subsidy seems to have produced not £70,000 but £120,000. In 1640 it was worth about £50,000.* It is observable, too, that through the whole of the reigns of Elizabeth and of James the fall had been constant. The financiers of the Long Parliament devised a more efficient way of taxing estates. The sum which was to be raised was fixed. It was then distributed among the counties according to their supposed wealth; and was levied within each county by a rate. In this way assessments were raised during the Commonwealth varying from thirty-five thousand to one hundred and twenty thousand pounds a month.† As the Cavaliers borrowed from their old opponents the Excise, so also they followed the same example in other branches of finance. Subsidies were occasionally used under Charles the Second, but gradually gave way to the more convenient method of assessment. At length, in 1692, when the demands of the war were urgent, the Commons resolved that a new and more accurate valuation of estates should be made throughout England, and that on the rental thus ascertained a pound rate should be paid to the Government. Such was the origin of the present Land Tax, the direct representative of the old subsidies; as the hereditary Excise recalls the military tenures and their fruits; and as the department of woods and forests keeps alive the memory of the once

* Macaulay, iv. 314; Gardiner, i. 288. † Macaulay, iv. 315.

ample domains of the Crown. Yet that Land Tax, although its produce far exceeded that of any previous financial expedient, soon lost its original importance. The exigencies of war led to debt, to the imposition of permanent taxes pledged for the repayment of that debt, and to the constant search for new objects of taxation to meet the demands of the ever-increasing debt. It is no part of my present purpose to narrate our financial history. It is enough that that great war tax, once the most productive of the resources of the state, whose extraordinary results roused the anger and the envy of Lewis the Magnificent, now yields an insignificant fraction of our revenue in time of peace. But I proceed to trace the growth of that modern system of finance which of all our developments would probably seem the most strange to Cecil or to Hyde, where subsidies are reckoned not in thousands but in millions, and yet where no misunderstanding on questions of revenue has ever arisen between our Queen and her faithful Commons.

Commencement of modern finance.

§ 5. In many respects the reign of Charles the Second forms a remarkable era in our history. It marks, as Mr. Hallam* observes, the transitional state between the ancient and the modern schemes of the English Constitution. In nothing was this character of the period more conspicuous than in its financial arrangements. Charles the Second completed the great though almost silent change which the Commonwealth had begun. During that brief but memorable interruption of the Royal authority the military tenures had, as we have already seen, fallen; and their burthensome incidents had disappeared along with them. A new mode of raising money had been discovered in the Excise and in stamp† duties. The old

* *Const. Hist.*, ii. 354.

† Macaulay, iv. 488.

methods by subsidies were rendered more efficient. The House of Commons had been familiarized with the direction of the supplies. All these innovations were after the Restoration either formally adopted, or spontaneously struck root in our system. But other novelties of the same kind soon grew up around them. In this reign we first meet with the imposition of permanent taxes.* In this reign, too, we meet with the first Parliamentary authority for the issue of negotiable public securities † bearing interest. In it the separation of the Exchequer from the Treasury was effected. In it arose, in circumstances of infinite shame, the small beginnings of our national debt. Above all in it was established the great principle of appropriating supplies. It is not my purpose to discuss the numerous questions that spring out of this subject. I merely desire to show the change that has taken place in our financial system, and the steps by which it was accomplished. That change is mainly due to the steady application of the principle of appropriation, and to the facilities for carrying into effect that principle which a fortunate alteration in the constitution of the Treasury afforded.

We have seen that in theory an aid was a voluntary donation. It therefore might be, and, in fact, it often was, altogether withheld. But when once granted it was at the absolute disposal of the King. There are very few examples in our early history of any attempt to specify the purpose for which any grant was made, and still fewer attempts to enforce the prescribed application. During the minority of Richard the Second, ‡ and again in the early part of the reign of Henry the Fourth, the subsidies were paid into the hands of persons named in the Act of

* May, *Const. Hist.*, i. 475. † Levi's *Annals*, vii. 413.
‡ Hallam, *Middle Ages*, ii. 59, 86.

Grant; and disbursements were made by these persons for the purposes for which the money was voted. But for nearly two hundred and twenty years no effort was made to control in this respect the Royal discretion. The first proposal of any such control came from the most unlikely person. It was an offer to Parliament of James the First, at the suggestion apparently of the Duke of Buckingham. The King was about to commence the war with Spain, in which the folly of his favourite had involved him; and in his own great pecuniary embarrassment he hoped that by engaging in a popular war he might succeed in obtaining without rigorous terms some assistance for his own wants. Accordingly he graciously told the Commons that the supply which he asked them to vote for the war might be paid into the hands of commissioners named by themselves. Some grants were made on similar conditions in the doubtful period of 1641; and during the Civil War and the Commonwealth the House of Commons had by its committees controlled the whole receipts and issues of the public treasury. These precedents, therefore, prepared the way for new proceedings after the Restoration. In 1665 a very large sum was asked for the Dutch war,* although in the preceding year double the amount had been granted. The fate of these moneys was more than a matter of suspicion. In order to prevent such scandals Sir George Downing, one of the Tellers of the Exchequer, carried the addition to the Subsidy Bill of a proviso that the money raised by virtue of that Act should be applicable only to the purposes of the war. The King had reason to think that he could more easily obtain advances upon such a security for speedy repayment than if no appropriation clause were inserted; or perhaps hoped† that he could

* Hallam, *Const. Hist.*, ii. 355. † See Cox, *Inst. of Eng. Govt.*, 200.

thus decently evade the repayment of the loans which he had obtained from some of the bankers. Accordingly, greatly to the vexation of Lord Clarendon, who denounced the proviso as a republican innovation derogatory to the honour of the Crown, His Majesty informed his ministers that the clause had been proposed with his sanction, and insisted that it should be retained. From that time the appropriation of Parliamentary supplies became an undisputed principle. It was recognized by frequent though not uniform practice during the reigns of Charles and of James; and from the time of the Revolution the usage has been invariable. In the bill by which their first aid was granted to William and Mary a clause, prepared after great consideration by Lord Somers at the special direction of the House of Commons, was inserted; and its substance was for many years repeated in every succeeding bill. By that clause it was enacted that out of the money in the Exchequer specified sums should be appropriated to the particular services mentioned in the Act; that all money received by collectors should be paid in due course into the Exchequer; and that the officers of the Exchequer should be liable to severe penalties if they permitted any sum to be applied otherwise than as the Act provided. The establishment of the Consolidated Fund, of which I shall presently speak, removed the necessity for Lord Somers's famous clause. The Act* by which that fund was created provided that after payment of certain specified charges the balance should be applied to the public service under the direction of Parliament. Hence it follows that the Crown has of itself no inherent or Common Law authority to deal with that statutory fund, and, consequently, negative words† in any Act which appropriates any part of it are mere

* 29 Geo. III. c. 13. † See Todd's *Parl. Govt.*, i. 528.

surplusage. But, for the purpose of maintaining the constitutional control of Parliament, the Appropriation Act is never passed until the last days of the session; and some provision must necessarily be made for the interval between the expiration of the preceding financial year and the commencement of the new Appropriation Act. This provision is effected by what are called in England ways and means bills, and in these colonies supply bills. These bills grant to Her Majesty the sums therein mentioned "towards making good the services voted in the present session," and are passed in the usual way. On the faith that the recommendations of the Crown have been approved by the Commons, and upon the understanding that before the end of the session these advances will be adjusted and duly appropriated, the Upper House readily agrees that payments on account to the specified extent shall be made for the purposes mentioned. Such acts never contain* any clause of specific appropriation, and the Treasury can therefore, within the limits of the votes taken, apportion the grants at its discretion. But the word "vote" is a term of art,† and implies that the resolution thereby announced ends with the current session. Hence if, as has sometimes happened, the session terminate without an Appropriation Act, there remains nothing upon which the Ways and Means Acts can operate. They are not repealed, and payments already made under them are valid. But as they are limited to "services voted in that session," and as these votes no longer exist, the grants become inoperative, and must be revoted when Parliament has again assembled.

The consequences of this principle of appropriation are very noteworthy. Its immediate effect was to necessitate the annual submission to the House of Commons of detailed

* Bourke's *Parl. Precedents*, 50.

† *Ahook v. Fergie*, 4 W. W. and A'B., 285.

estimates both of expenditure and of income. Thus the House at once acquired a general control over all the parts of that expenditure. It could criticise each particular in detail. If the information supplied to it was insufficient, it could make further inquiries. Its attention was thus specially directed to the proceedings and the general efficiency of every public department. It therefore naturally required that all public moneys should be received under its directions, and that all expenditure of such moneys should be made under its sanction. On this principle the cost of collecting the several branches of the public revenue is now no longer defrayed out of the revenue so collected. For the avowed purpose of bringing the gross income and expenditure of the kingdom under the immediate control of Parliament, a statute* of the present reign provides that the allowances and payments formerly made for the charges of collection and management shall cease to be payable out of the particular branches of revenue, and that these charges shall be defrayed out of supplies from time to time appropriated by Parliament for the purpose. In the same manner a change was effected in the mode of dealing with the revenue derived from the Crown lands. The commissioners of woods and forests were also charged with the superintendence of public works, and not unnaturally applied to the latter purpose the income which they derived from the original trust. It was therefore found expedient† to separate the two departments. The proceeds of the woods and forests are paid into the Consolidated Fund; and whatever sums are needed for public works are voted by Parliament out of the general income of the state. As the final result of many successive changes,‡ all the public revenues and moneys borrowed are placed to one account, called the

* 17 and 18 Vict. c. 94. † May, *Const. Hist.*, i. 213.

‡ Levi, *On Taxation*, 246.

Consolidated Fund; and all payments are made out of that fund, either by permanent grants under Acts of Parliament, or by annual votes payable by limited grants. About twenty-eight millions sterling, including the charge for the interest of the national debt, are annually paid under the authority of permanent statutes. The remaining portion of the national expenditure is subject to the annual vote of the House of Commons, and applies to about 230 different services, for each of which separate provision is made.*

§ 6. The means by which the Appropriation Act is carried into effect are found in the independent action of the several departments of the Treasury, the Exchequer, and the Audit. Under this system the Treasury checks the other departments, and the Exchequer controls the Treasury. When any sum has been appropriated by Parliament for any service, the executive department to which that service belongs is bound to apply the money to the purposes for which it is granted, and not to exceed the amount so provided. The Treasury does not interfere with any contracts that the department makes, or with any expenditure that it incurs. But if any department appear to be spending a larger portion of its grants than it should prudently spend in a given time, the Treasury may require that department to revise its accounts and estimates, and to show that it has made a sufficient provision for conducting the public service during the year. When the Treasury requires money, either for its own uses or for that of any department, it obtains a Royal Sign Manual Warrant prepared in a certain specified form and authorizing the issue of the required sum; and thereupon directs to the Exchequer

Appropriation of supplies.

* Levi, *On Taxation*, 248; *Report of Committee of House of Commons on Public Money*, 1850.

certain instruments styled Treasury Warrants and Issuing Letters. It then becomes the duty of the Comptroller-General of the Exchequer to ascertain whether Parliament has agreed to the vote to which the Royal Warrant refers; whether the bill for providing ways and means applicable to such a vote has become law; and whether the Sign Manual reciting the special purposes of the vote and not exceeding its amount, the Treasury Warrant, and the Issuing Letter are in substance and in form conformable to law. If he be satisfied that each of these five indispensable conditions has been duly fulfilled, it is his duty to direct by his Exchequer Warrant the Bank of England, in which the money is deposited, to grant a credit from the Exchequer account to the department mentioned by the Treasury for the exact sum required, and for the specified service authorized. If the Treasury Warrants be not in accordance with the votes of Parliament, or be not authorized by the Royal commands, the Exchequer is bound to refuse compliance with any such demand from whatever minister or department it is made.*

This distinction between the Treasury and the Exchequer seems to have been known at a very early period. The Exchequer, indeed, exercised three different functions, although it was not until a comparatively recent date that its development was complete. It exercised certain judicial powers in cases of revenue; it investigated and directed payment of accounts; and it received and issued revenue. The Department in the exercise of these various functions was under the presidency of the Lord High Treasurer. When this officer acted personally at the Treasury, no written directions from him were required to execute the Royal writs. But as the other duties of

* Levi's *Anna's of Brit. Leg.*, ii. 170.

the Treasurer increased, he became unable personally to attend to the execution of these writs, and was obliged to give his written directions to his officers. It is supposed that Lord Burleigh was the first Treasurer who notified through a secretary his orders to the officers on the receipt side of the Exchequer. The practice, however, was not uniformly observed ; but after the Restoration the departments seem to have occupied different offices,* and thus the separation became marked. At the same time the practice was introduced of appointing several persons to execute the office of Lord High Treasurer: and as the Exchequer could not take orders from a plurality of persons, the system of Treasury Warrants became established.†

Something more, however, was required for securing the proper application of the supplies than the provisions of an Appropriation Act or the erection of the Exchequer as a separate department. It appears from Pepys that large sums which were appropriated to the war were paid into the Privy Purse. Upwards of thirteen hundred thousand pounds had been from time to time borrowed by the King from various bankers. The creditors received orders upon the Exchequer for repayment of their principal and interest out of the moneys coming into the Exchequer. But in 1672, under the authority of an Order in Council, the Exchequer was closed, and payments were discontinued. Three years afterwards a motion to pay a grant made for building ships into the Chamber of London, and not into the Exchequer, was lost by a very small majority ; and in 1680 one of the grounds of impeachment against Sir Edward Seymour‡ was his application to the uses of the army of money that had been appropriated to naval purposes only. It is necessary, therefore, if the Exchequer

* Cox, *Inst. of Eng. Govt.*, 682. † *Ib.*, 603. ‡ 8 *State Trials*, 127.

is to exercise an efficient control, that its chief officers should not be subject to the political servants of the Crown. The Exchequer, in fact, like the courts of law, is a co-ordinate and not a subordinate branch of the public service. The Comptroller of the Exchequer, or, as he is now styled, the Comptroller and Auditor-General, holds his office by the same tenure as the judges. If he refuse without sufficient reason to obey any Treasury Warrant, the Treasury may move for a mandamus in the Court of Queen's Bench.* Thus the matter of law, whether the payment in question is or is not authorized by the Act of Parliament under which the warrant purports to be issued, is duly determined by the proper tribunal.

The third form of financial control is the system of audit. On various occasions in our history, both before and after the Revolution, special commissions have been appointed under the authority of Parliament to examine the Royal accounts. After the Revolution the duty of audit was usually performed by the Exchequer. In 1785 a distinct and permanent Board of Audit was appointed, and the authority of these Commissioners was by various statutes extended to the greater part of the public service. In 1866 the departments of the Exchequer and Audit were consolidated.† The Board of Audit was abolished, and its powers and duties transferred to the chief officer of the Exchequer under the title of the Comptroller and Auditor-General. This officer, in addition to his functions at the Exchequer, examines and certifies the accounts of the various departments of the receivers of revenue. It is his duty annually, in a separate report for each leading department, to report for the information of the House of Commons the result of his examination; and if the Treasury delay to present any of his reports within the

* Bowyer, *Com. on Const. Law*, 210. † 29 and 30 Vict. c. 39.

prescribed time, he is himself to present it. In these reports he must call attention to every case in which it may appear to him that a grant has been exceeded, or that money received by any department from other sources than the annual grant has not been applied or accounted for according to the directions of Parliament, or that a sum charged against a grant is not supported by proof of payment, or that a payment so charged did not occur within the period of the account, or was for any other reason not properly chargeable against the grant.

Constitutional theory of taxation.

§ 7. There are some matters of present practical importance of which the original character of Parliamentary taxation affords the proper explanation. Since the object of a Parliamentary grant was to supplement a revenue already available for public purposes, every grant was originally preceded by a statement on the part of the Crown of the Royal exigencies, and of the sums required for their relief. The modern change in the pecuniary position of the Crown has not affected the necessity of such an application to Parliament. The supplies are still granted to the Crown. To the Crown still belongs the management of the revenues of the state; and by it all payments for the public service are still made. The Crown, therefore, makes known to the Commons the pecuniary requirements of the Executive Government; and the Commons upon this information both grant such supplies towards these requirements as they think fit, and provide suitable means for raising the necessary amount. The foundation, therefore, of Parliamentary taxation is its necessity for the public service as declared by the Crown through its political advisers.* It

* May's *Parl. Practice* (6th ed.), 547; Todd, *Parl. Govt.*, i. 475.

is accordingly a fundamental rule of the House of Commons that the House will not entertain any petition or any notice for a grant of money, or which involves the expenditure of any money, or any motion* that will involve a charge upon the public revenue, whether direct or out of money to be provided by Parliament. On the same principle, if the Estimates show profusion or carelessness, the House of Commons ought not itself to undertake the hopeless task of amending them, but ought to return them for reduction.† We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money for their respective constituencies; of the "log-rolling," and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that "good government is not attainable while the unrestricted powers of voting public money and of managing the local expenditure of the community are lodged in the hands of an Assembly."‡

This salutary rule has too often been evaded. The House of Commons sometimes addresses the Crown, requesting that a sum of money be issued for some particular purpose, and promising to make good the amount. This practice§ has been generally confined to small sums, and to services the amount of which cannot be immediately ascertained. It is sometimes also adopted at the end of the session, when the Committee of Supply has closed, and

* Todd, *Parl. Govt.*, i. 492.

† See Earl Russell's *Speeches*, i. 25; Sir L. Malet's *Cobden*, 45.

‡ Lord Durham's *Report on Canada*, 211; see also Earl Grey's *Colonial Policy*, i. 174.

§ Cox's *Inst. of Eng. Govt.*, 192.

when the sum is not of sufficient magnitude to induce the re-opening of the committee. It is rarely used, and never to any considerable extent, to overcome the reluctance of ministers to some proposed outlay. Even in this extent the best Parliamentary authorities * regard the practice with great disfavour. But in colonial governments this expedient has become habitual. The Constitution Act of Victoria expressly requires the Governor's recommendation for any appropriation. It is, however, customary for the Legislative Assembly to request the Governor to recommend some particular appropriation, and the Governor complies with the request as of course. It is evident that when this system of address is freely used, it removes almost entirely the constitutional check, and takes away one of the great advantages of our modern system of government—the administration, namely, of the public revenue, not by a large Assembly, but by proper and responsible officers. The Assembly is thus enabled, without any check, to extend indefinitely the public expenditure. The ministry pleads the interference of the Assembly as an excuse for the omission of their primary duty, the balance of expenditure and income.

Parliament has, in matters of supply, a double function. It both makes the grant and provides the funds for its payment. The grant, as we have seen, is made upon the request of the Crown. But the ways and means by which the amount granted is raised are exclusively a Parliamentary question, and in them the Crown has properly no concern. I have already said that, at the present day, the official statement by the Crown of the wants of the public service invariably meets with a ready response. Hardly an instance has occurred since the Revolution of even a reduction, much

* See 3 *Hatsell*, 178.

less a refusal, of supplies. So far as the requirements of the state are concerned, the money is duly provided. But the form and the incidence of the taxes by which that money must be raised are matters on which wide differences of opinion may prevail, and which are not included in the policy of the Crown. On several occasions the House of Commons has refused to adopt the financial proposals of the ministers. In 1767 the Land Tax was reduced against ministers by one shilling in the pound, a vote memorable* not only as the first financial defeat which the Government had sustained since the Revolution, but as leading, in the attempt to supply the deficiency thus produced, to the ill-omened renewal of the dispute on American taxation. In 1796 Mr. Pitt† proposed a succession duty upon real property; but he was saved from defeat only by the casting vote of the Speaker, and was obliged, however reluctantly, to abandon the project. In 1816, after the restoration of peace, Lord Liverpool's Administration proposed to retain at half its former amount the income tax which had been paid during the greater part of the French war; but the motion was lost, and the Government acquiesced in the decision of the House.‡ On several occasions since the Reform Act the ministerial budget has not been regarded with favour. In such circumstances the Chancellor of the Exchequer has usually withdrawn the obnoxious proposals, and has endeavoured to suggest other and more acceptable modes of raising money. I do not think, however, that there is any case, except those of Lord Derby upon his defeat on the House Tax in 1852, and of Mr. Gladstone in 1885, in which a defeat upon a budget caused the resignation of ministers. Unless, indeed, some great question of commercial or financial policy were at stake.

* Massey's *Hist. of Eng.*, i. 307. † Stanhope's *Life of Pitt*, ii. 309.
‡ Sir G. C. Lewis's *Administrations*, 394.

it is difficult to see how the servants of the Crown, if the necessary supplies be in some way voted, are, as such, concerned with any matter of ways and means. The House will not tax its constituents, as it will not grant the produce of their taxes, without the assurance of the Crown that the Public Service requires such a sacrifice. Hence a private member* cannot propose a new tax, except as an amendment upon a tax proposed by a minister. The Crown, therefore, practically certifies to Parliament the insufficiency, or the unfitness, of the existing taxes. But the Crown is concerned in the amount raised, not in the method of raising it. It is, doubtless, convenient that the officer who is charged with the general financial arrangements of the country should assist the House in its deliberations by preparing for its consideration a financial scheme ; but the acceptance or the rejection of this scheme by the House, although it may affect his Parliamentary reputation, implies no approbation, and imputes no blame, of his ministerial conduct.

Although Parliament supplies grants to the Crown, and provides the ways and means for raising these supplies, the functions of the two Houses of Parliament are not in this respect alike. The House of Commons has acquired in this matter peculiar powers. It claims as within its exclusive jurisdiction all questions of finance. With the initiation of all such questions, and with all their details, this House exclusively deals. The House of Lords on these bills, like the Crown on these and all other bills, retains the general power of assent or rejection only, but not of amendment. The functions, then, of the several powers of the state in matters of finance may be thus briefly stated :—The Crown makes requisition to the Commons for the supplies which

* May's *Parl. Practice* (6th ed.), 567.

the Public Service demands. The Commons grant the supplies, and provide the ways and means for raising them. The Lords assent to these grants and these financial arrangements. The Crown accepts the grants, and assents to the legislation which they involve.

The earliest distinct precedent for the exclusive right of the Commons to initiate Money Bills is the Indemnity of the Lords and Commons* in the year 1407. The exemption of such bills from amendment by the Lords may be dated from the Conferences of 1671 and 1678. These principles may now be regarded as firmly settled. The House of Lords indeed has never formally abandoned its right of amendment, but it has for many years abstained from its exercise in cases likely to excite dispute. In 1860 the House of Lords rejected for financial reasons a bill which the House of Commons had passed for the repeal of the Excise duties on paper. The House of Commons, after appointing a committee to search for precedents and passing certain declaratory resolutions, passed in the following session a bill which included various enactments for the repeal of some taxes and the imposition of others. Among the taxes so repealed were the paper duties. The House of Lords was thus obliged to deal with the financial scheme as a whole, and either to assent to it or reject it in its entirety. After some opposition the bill was passed, and the practice† has since been regularly followed. From this precedent and the discussions connected with it several inferences may, I think, be obtained. It seems to be clear that the Lords may in their discretion reject any bill, whether on finance or on any other subject, that is brought before them. This discretion, however, has been rarely exercised, and probably ought not to be exercised on financial grounds only. But such forbearance is

* 9 Henry IV., *Rot. Parl.*, iii. 611. † Todd, *Parl. Govt.*, i. 404.

not expected where questions of general commercial policy are involved.* The precedent further establishes that it is competent for the House of Commons to deal with the ways and means of the country as a whole; and to include, as parts of its financial scheme, in one bill provisions for the imposition for the repeal and for the substitution of taxes, whether the new or the old tax be temporary or permanent. It must, however, be observed that this power extends only to the different kinds of tax bills. The precedent of the paper duties does not sanction the combination of a Tax Bill with an Appropriation Bill or with any other measure not connected with ways and means.

Consolidated Fund and permanent taxes.

§ 8. This distinction between the revenue itself and its sources, between the imposition of taxes and the dealings with their proceeds, has risen into prominence during the last century. Within that period the growth of the national debt, and the ever-increasing magnitude and delicacy of commercial transactions have sensibly modified our system of finance. When the debt was first created, it was on the security of a single tax.† As further loans were required, further taxes were specially mortgaged. Several attempts to consolidate these charges during the first half of the eighteenth century seem to have been made. The various branches of the public debt were grouped ‡ under the heads of the Aggregate Fund, the General Fund, and the South Sea Fund, that is the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by the South Sea Company and its annuitants. Notwithstanding this partial classification, the mode of dealing with separate sources of income and separate charges was

* See May, *Const. Hist.*, i. 476; Peel's *Memoirs*, ii. 269.

† Macaulay, *Hist. of Eng.*, iv. 326. ‡ 2 Stephen, *Com.*, 590.

always troublesome, and as commerce increased became intolerable. The duties of Customs, of Excise, and of Stamps were complicated to an incredible extent. Different duties were assigned to pay the interest of different loans, and articles were charged with various rates under perhaps twenty or thirty different statutes. Merchants could not tell to what duties their goods were liable, and were obliged to rely on the clerks of the Custom-house.* At length, in 1787, Mr. Pitt effected a thorough reform. So complicated was the subject that the number of resolutions of the House of Commons in committee on which his bill was founded amounted to 2,537.† By the provisions of this measure‡ all the various duties upon each article were brought into one integral sum, the moneys received on the public account were formed into a single account, called the Consolidated Fund, and upon that fund, thus comprising the whole public revenue, all debts due by the state were charged. Since that time various sources of revenue have been added, and various charges have been imposed; but the principle of management continues unchanged. The whole revenue of the country forms one fund. The application of that fund as it accrues, and the alteration, addition, or reduction of the sources from which it is supplied, are matters that are in their nature distinct.

Soon after this improvement in the mode of dealing with the income of the state was accomplished, another change affecting the means by which that income was provided came into increased operation. The contributions of the Royal tenants were, as we have seen, originally personal. They were levied either upon individuals or by special agreement upon communities, as the commissioners appointed for the purpose might deem either course to be

* See Earl Russell's *Life of Fox*, ii. 137.

† Earl Stanhope's *Life of Pitt*, i. 330. ‡ 27 Geo. III. c. 47.

advantageous to the King.* When the aids and scutages and tallages were replaced by subsidies on movables, the collection was effected by two chief taxors, appointed by the King for each county, who named twelve persons in every hundred to assess the movable estate of all inhabitants according to its value. Early in the reign of Edward the Third, on complaint of Parliament that these taxors were partial, commissioners were sent round to compound with every town and parish for a gross sum, which was thenceforth the fixed quota of subsidy, and was raised by the inhabitants themselves.† At a later period of the same reign, as we have already seen, the taxes became national. If we were to express by distinct names these changes, we might say that the aids became subsidies and that the subsidies became taxes. But these grants, whether they were aids, or subsidies, or taxes, were always temporary. They were meant to be merely casual and extraordinary additions to the Royal revenue. Tonnage and poundage seem to have been considered as a compensation for certain claims regarding the hereditary revenue of the Crown, and until the accession of Charles the First were always granted during the life of the King. The Excise duty in the reign of Charles the Second was avowedly substituted for the hereditary revenue derived from the military tenures. The earliest permanent tax in the proper sense of the term seems to have been that known as Hearth Money, and imposed in 1662.‡ No other tax of a permanent character was imposed until after the Revolution, when duties were raised on beer, salt, vellum, paper, houses, and coffee.§ The Customs were made perpetual in the reign of Queen Anne. From that time, according to the practice of imposing taxes to

* 1 *Lords' Report*, 361.
† Hallam's *Middle Ages*, iii. 47.
‡ 14 and 15 Car. II. c. 3.
§ May, *Const. Hist.*, i. 475.

meet loans, the number of permanent taxes considerably increased. But within the present century the tendency towards permanent taxation has far outgrown the necessity for meeting the interest of the debt. In 1798 the Land Tax was made perpetual. In 1822 the Malt Tax, in 1826 the tax on tobacco and snuff, in 1836 the tax on pensions and offices, were dealt with in a similar manner. In 1846 a permanent settlement was made of the last of the great annual taxes, and the sugar duties* to the amount of five millions a year were fixed by Act of Parliament. Except the Income Tax no considerable portion of the revenue is now temporary; and whatever is permanent is of course withdrawn to a certain extent from the immediate and unlimited control of the House of Commons.

§ 9. We may thus see why the good old method of stopping the supplies, which our ancestors used with such effect and of which their descendents sometimes speak so foolishly, has become obsolete. It has declined for the same reason that the Roman Stoppage of the Conscription declined. That refusal formed the great defensive weapon of the early Plebeians, and accordingly some politicians of the later Republic† thought that its revival would effectually check the Senatorial party. But the practice belonged to an essentially different state of political conditions; and when that state was changed its occupation was gone. In our circumstances to stop the supplies would be a very efficient means to embarrass ourselves, but it would cause no personal inconvenience to the Queen. When the whole Public Service looked to the Crown as its real and not merely its legal paymaster, or when any objectionable line

Stoppage of supplies obsolete.

* See 3 *Hans.*, clxii. 1981. † Mommsen's *Hist. of Rome*, iv. 89.

of policy was pursued under the personal direction of the King, the refusal of supplies was a formidable check. But when the Civil List has been separated from all the charges relating to the Public Service, and when the policy of the Crown is the policy of ministers in whom the House of Commons has confidence, and when permanent charges are provided for by permanent taxation, the old remedy loses all its virtue. The Queen, indeed, when a money bill is presented to her, still, in the same gracious words of Norman French which on similar occasions her ancestors were wont to use, thanks her good subjects, accepts their benevolence and also wills it ; but her gratitude for this benevolence is purely official. The supplies, although they are granted to the Crown, are for public purposes only ; and if the Commons be liberal, they are liberal to themselves and their constituents. Once and only once since the Revolution, in 1784, did the Commons attempt to withhold the supplies ; and the failure of their project was complete. They did not compel the resignation of the ministry. They did not prevent the dissolution of the Parliament. We may, therefore, consider that this great political remedy is wholly inappropriate to our modern Constitution. All the objects which it was ever used to obtain can now be obtained more surely by gentler means.

Colonial Legislatures, misled not perhaps unnaturally by English traditions, have sometimes reduced to practice this constitutional theory. I am not aware whether in any instance they have attained their object. The following case,* however, illustrates the consequences at the present day of a stoppage of supplies. In 1848, in British Guiana, a dispute arose between the Government and the representative

* See Earl Grey's *Colonial Policy*, i. 146, 157 ; see also *Ib.*, 187, 411.

branch of the Legislature, then styled in that country the Combined Court, respecting a proposed reduction of the salaries on the Civil List. The Combined Court proposed the measure on the ground of the distressed condition of the colony. The Government opposed it on the ground, among others, that it involved a flagrant breach of faith with the existing officials. It was the period at which the great changes in British commercial policy were being carried into effect, and the sugar-growers were eager to recover the protection which they had lost. In concert, therefore, with the Protectionists in England, and as part of a general system of embarrassing a Free-trade Government, the Combined Court resolved to stop the supplies. The principal portion of the colonial revenue was raised by an annual tax, the ordinance for which was not on this occasion renewed. It was probably thought that the Home Government would in these circumstances resort to strong measures, and would, as they had on a former occasion done in the case of Jamaica, seek the aid of the Parliament of the United Kingdom against the contumacious colonists. Such a proposal would, in the then state of political parties in England, have probably been unsuccessful, and the prospects of those who were struggling to recover for the British sugar-grower the monopoly of the Home market would have been improved. These expectations, if they had been entertained, were disappointed. The Governor was instructed that, although a revision of salaries might take place as vacancies occurred, the rights of the present officers must be maintained; and that no change in the commercial policy of the kingdom would be proposed. He was further instructed that, as the colony declined to provide the pecuniary means requisite for carrying on the Public Service, he must strictly confine himself to the exercise of his legal powers; that these public services for

which he was refused the means of providing must be discontinued, even if this course involved disbanding the police, and shutting up the hospitals, and an interruption of the regular course of justice ; and that, if the usual colonial allowances were not paid to the officers of Her Majesty's troops serving in the colony, the troops would be withdrawn. After allowing the usual collection of taxes to be suspended for eleven months, the Combined Court renewed the tax-ordinance for three months ; and within a short time afterwards the usual financial measures were passed and the controversy terminated. The result of this contest was that the Combined Court failed to attain the objects for which it contended ; that the colony lost nearly a year's income, and also incurred a considerable debt ; that the consumers derived no benefit from the non-collection of the import duties ; that ideas of insubordination were excited in the labouring classes ; that credit generally was shaken, and the depreciation of property aggravated ; and that, in addition to the delay of many urgent measures of general utility, a reduction of taxation which might have been immediately effected was postponed for three years.

CHAPTER XIV.

THE EXPENDITURE OF THE CROWN.

§ 1. The appropriation of supplies* was not the only measure of financial reform which is due to the Revolution. Warned by the example of the last two reigns, the Convention Parliament was not inclined to imitate the dangerous generosity of its predecessors, and to supplement the hereditary revenue with the grant of taxes for life. The accounts which the House obtained of the Royal receipts and expenditure showed a remarkable tendency towards an increase of income, arising from the increased produce of the indirect taxes as the wealth of the country increased ;† and at the same time showed various modes of outlay which could not be regarded without alarm. The hereditary excise, the substitute for the military tenures for which eighty years before the Commons had been with great difficulty induced to offer, as a sum far exceeding their actual amount, an annuity of £200,000, now produced an income of nearly four times that sum ; and was from year

The Civil List.

* Lord Mansfield, C.J., observes that "a great difference has arisen since the Revolution with respect to the expenditure of the public money. Before that period all the public supplies were given to the King, who, in his individual capacity, contracted for all expenses. He alone had the distribution of the public money. But since that time the supplies have been appropriated by Parliament to particular purposes ; and, now, whoever advances money to the Public Service trusts to the faith of Parliament."—*Macleath v. Haldimand*, 1 T.R. 176.

† Hallam, *Const. Hist.*, iii. 114.

to year steadily and rapidly on the increase. The Customs showed a similar tendency to rise. But nearly half of the whole revenue was expended upon what was then the great object of national fear and hatred, a standing army; and a large proportion of the residue was placed under the suspicious head of secret service money. The Commons therefore felt that the time had come for a revision of the whole financial position of the Crown. William had expected that he would be placed in at least the same pecuniary position as his uncles. The duties of Excise and of Customs, which produced about £900,000 a year, had been granted to James for his life; and William thought that this addition to his hereditary revenues should be renewed to him for the same period. But on this point the Commons were inflexible; and William was deeply mortified and offended by their apparent want of confidence.

It is not easy, and for the present purpose it is not material, to state the precise figures of this settlement. There were three principles which on this occasion the House of Commons established. It fixed an annual sum as sufficient for "the constant necessary charge of supporting the Crown in time of peace."* It divided that sum into two parts, of which it appropriated the one to the charges of the civil Government and the other to the maintenance of the navy.† It declared that certain specified articles were part of the charges of the civil Government. On this basis provision was made to supplement the hereditary revenue. A compromise respecting the duties granted to the late King was effected. That portion of the Excise which had been settled on James for life was settled on William and Mary for their joint and separate lives.‡ It was supposed that from the hereditary revenues and from

* 3 *Parl. Hist.*, 193. † *Ib.*, 235.

‡ Macaulay, *Hist. of Eng.*, iii. 558.

this addition to them their Majesties would have an annual income of between seven and eight hundred thousand pounds independent of Parliamentary control. On this income were charged the expenses of the Royal Household and of certain civil offices which had been enumerated in a list laid before the House. The duties of Customs, which had formed the larger part of the extraordinary revenue granted for their lives to Charles and to James, were now granted to the Crown for a period of only four years. The wars which continued with little interruption during the reigns of William and of Anne disturbed to some extent this financial policy; but the principle that the regular and domestic expenses of the Crown should be determined by a fixed annual sum, and that this sum should be kept apart from the expenses of the various departments of the public service, was never afterwards abandoned.

The next material change was the surrender by George the Third of the principal hereditary revenues in consideration of a definite Civil List. His Majesty received an annuity of £800,000, out of which he defrayed, as his predecessor had done, the expenses of the Royal Household and the other specified charges which gave to this branch of the revenue its name. In addition to this income the King possessed the droits of the Crown and Admiralty, and some other sources of casual revenue, including Civil Lists for Ireland and Scotland. In fact, however, the income of the Crown was during this reign much greater than these figures represent. During the reign of George the Third the Civil List was relieved of charges amounting in the whole to nine and a half millions,* while in the same period the Royal debts were

* May, *Const. Hist.*, i. 204.

paid by Parliament to the amount of between three and four millions. On the accession of William the Fourth several other important changes were made. The whole revenues of the Crown, without any reservation, but not including the revenues of the Royal Duchies, were surrendered to Parliament. The Civil List was still further relieved from charges, such as the salaries of the ministers and of the judges, which belonged rather to the administration of public affairs than to the dignity or the personal comfort of the Monarch. The Civil List was divided into five different classes, to each of which a special annual sum was appropriated. These principles have been adopted in the construction of Her Majesty's Civil List. Suitable provision is thus made for Her Majesty's Privy Purse, for the salaries of the members of Her Majesty's Household and retiring allowances to them, for the expenses of Her Majesty's Household and for her domestic servants, for the Royal bounty, alms, and special services, and for pensions. Thus all that relates to the splendour of the Crown, or the personal opulence of the Queen, forms a distinct item in the national expenditure. But all charges relating to the various departments of the Public Services receive a special consideration. They are no longer confused with the personal expenses incident to Royalty. For those services Parliament can now make, without any apprehension of interference with the Royal income, such provision as the circumstances of each case may from time to time require.

§ 2. One branch of the expenditure for which the Civil List now provides merits a separate notice. It was part of our ancient constitutional policy* to furnish a

* Burke's *Works*, iii. 385.

permanent reward to public service, and to make that reward the origin of families, the foundation of wealth as well as of honour. The Crown, which has in its hands the trust of the daily pay for national services, was held also to have in its hands the means for the repose of public labour and the fixed settlement of acknowledged merit. In accordance with these principles it was held that the King might alienate or charge not only the Royal domains, but also any part of the Royal revenue, from whatever source it might be derived. This power, although it did not receive a judicial confirmation until the celebrated Banker's case in 1691,* had previously been freely exercised. But within a few years afterwards the same Act which limited the alienation of the Crown Lands further provided that no portion of the hereditary revenue should be alienated for any term beyond the life of the reigning King. This Act did not affect the hereditary revenues of Scotland and of Ireland and some other sources of revenue. When the hereditary revenues were exchanged for a fixed Civil List, the extent of that fund was the only limit to the charges upon it. No other limit was assigned to the amount of pensions; and no principle in their distribution regulated the discretion of the King and his advisers.

Regulation of the Royal bounty.

This unrestricted power of granting pensions was thus a formidable weapon in the hands of the Crown. The amount of pensions charged on the Civil List on an average of seven years before Mr. Burke's great movement in 1780 for economic reform was considerably more† than £100,000 a year. The amount of similar charges on the Irish revenue amounted in 1793 to £124,000. In 1810 the pensions charged upon the revenues of Scotland

* 5 *Mod.*, 29. † Burke, iii. 383.

amounted to £39,000. Various limitations were placed by Parliament on each of these funds as available for the payment of pensions. At length, on the accession of William the Fourth, when the remaining portions of the casual revenues were surrendered, the Pension Lists of the three kingdoms were consolidated. The entire Civil Pension List for the whole United Kingdom* was reduced from upwards of £145,000 to £75,000; and the remainder of the pensions were charged on the Consolidated Fund. On the accession of Her Majesty a further change was made. The amount available for pensions was restricted to £1,200 in each year. It was also provided that these pensions should be confined to "such persons as have just claims on the Royal beneficence, or who, by their personal services to the Crown, by the performances of duties to the public, or by their useful discoveries in science and attainments in literature and the arts, have merited the gracious consideration of their Sovereign and the gratitude of their country."

§ 3. The change which in the last two centuries has taken place in the financial position of the Crown has materially affected the nature and the extent of the Royal influence. When the Royal revenue was of a proprietary character, the King, in addition to his political sources of influence, possessed those which naturally belong to every great landowner. The demesne lands of the Crown were even in the sixteenth century of great extent. They were scattered over almost every county in England. No attempt was made by the Crown to carry on the obviously unprofitable business of cultivating by its own servants these vast and

Effect of change in nature of Crown revenues.

* May, *Const. Hist.*, i. 217.

scattered estates. They were let out upon leases for terms of years, and in almost all cases at a low rent. Thus most of the great families of the nation were direct tenants of the Crown. They were subject, if they had given any cause of offence, to find at the expiration of their term that their rent was raised, or that an increased fine for renewal was demanded, or even that a renewal upon any terms could not be obtained. In many cases too these estates brought with them a predominant influence in boroughs which returned members to Parliament. Thus the gradual alienation of the Crown lands deprived the Crown of a double source of influence. It weakened the Royal authority among the constituencies, and it took away from the Crown the command of so many votes in Parliament.

Another great source of the Royal authority of the Crown was wardships. Although this incident of tenures was in its nature lucrative, its political uses seem not to have been overlooked. After the Reformation * wardships were regarded as an important means for securing by the proper education of the youthful heir the extension of Protestantism. But at all times this prerogative materially extended the influence of the Crown. Families were often placed at the mercy of the Court, and were treated according to their deserts. The youthful head of a loyal house would probably find that the Royal claims admitted of a moderate composition. When the family had given offence or been troublesome, the right of wardship afforded a good opportunity of indicating in a perfectly legal manner His Majesty's displeasure. So important was this prerogative in the time of the Tudors that Sir Thomas Smith † compares an attempt to deprive the King of it with an attempt "to take the club out of Hercules' hand." The Stuarts, however,

* Burnet, *Hist. of His Own Times*, i. 27.

† See Amos, *Statutes of Henry VIII.*, 66.

seem to have used this like every other branch of their prerogative, as a mere means either of getting money or of gratifying their favourites. In their hands a great political engine became an instrument of extortion. So much was this the case that at the time of the abolition of the military tenures the political importance of the question seems to have been generally overlooked. "Pierpoint," says Bishop Burnet,* writing of the statesman by whose agency the Act† for the abolition of these tenures had been carried, "valued himself to me upon this service he did his country at a time when things were so little considered on either hand that the Court did not seem to apprehend the value of what they parted with, nor the country of what they purchased."

The abolition of the military tenures produced another effect of the same kind, and probably as little foreseen. The prerogative was now no longer daily presented to men's minds as something distinct from and superior to the ordinary rules of law. When there had been any collision between the interest of the Crown and the interest of the subject, that of the latter invariably gave way. The King had certain privileges, both positive and negative, possessed certain rights, and was exempt from certain obligations, which advantages no subject could claim. It was merely in relation to his proprietary rights that these privileges existed or were at least of frequent occurrence. There was thus a reciprocal influence of the proprietary and the political powers of the Crown. The power of the great landowner was supported by the authority of the head of the state. The administration of the King derived half its strength from that irresistible power in matters of private right before which in

* *History of His Own Times*, i. 28. † 12 Car. 24.

the ordinary transactions of life the boldest and the most litigious must bow. Those who beheld constantly before their eyes "the gigantic image of prerogative in the full play of its hundred arms,"* could not fail, whether they were judges or private subjects, to entertain a vivid perception of its might, and a profound awe of that monarchy of which so vast a power formed but a part. When therefore the points of collision between the King and the subject were diminished or removed, when there was no longer compulsory military service, or wardship, or purveyance, or any other of their kindred grievances, when the Crown lands and escheats and other surviving rights of the Crown were managed no longer as the main supports of a failing income, but with the fortunate carelessness and magnanimous neglect of a public department, little remained on which these invidious Royal privileges could operate. Their present exercise, when they are called into action, is generally for the benefit and not for the oppression of the individual.

We have, in the reign of Henry the Eighth, a curious instance of the way in which the Crown could use its lawful prerogative to vex and harass those refractory subjects who dared to dispute its unlawful claims. The King was in 1545 engaged in a war with France. The exigency was great; the ordinary mode of obtaining a Parliamentary supply was slow both in its enactment and in its collection, and a grant for war purposes had recently been made. It was therefore determined to raise money by a benevolence or compulsory free loan from the wealthier classes. An alderman of London, Richard Reed, refused to pay what he regarded as an unlawful exaction. Such disobedience could not be overlooked. The feudal duties of his office,† although by long usage

* Hallam, *Middle Ages*, iii. 153; and see *Const. Hist.*, ii. 3.

† Froude, *Hist. of Eng.*, iv. 391.

they had been commuted for money payments, bound the alderman to render military service for a fixed period at the call of the Crown. Reed was accordingly sent to join the English army, which was then on active service on the Scottish border. Instructions were at the same time given to the general* to employ this unwilling recruit on the hardest and most perilous duty, and to subject him when in garrison to the greatest privations, that he might feel the smart of his folly and sturdy disobedience; and finally to use him in all things according to the "sharpe disciplyne militar of the Northern wars." Malicious courtiers record that the unfortunate alderman was taken by the Scotch; and was obliged to pay for his ransom a much larger sum than the amount of benevolence which he had been expected to contribute.

§ 4. It is needless to point out the influence which the Crown must have obtained from its power of granting its hereditary demesnes, or its casual revenues. The courtiers then formed a distinct profession. Like other professions, although more extensively and with more injurious effects, courtiership acted as a lottery. It contained some brilliant prizes and many blanks; but it kept dependent upon Court favour all who hoped to draw either some prize, or some prize better than that which they had already obtained. These prizes were many and various. Sometimes the grant of an estate was sought. Sometimes the gift was concealed under the thin disguise of a sale for an almost nominal consideration. Sometimes a license to do a prohibited act was granted. Sometimes a patent of monopoly was conferred. Although these and many similar grants were illegal, there were

Effect of regulation of Crown expenditure.

* Hallam, *Const. Hist.*, i. 25.

many sources of Royal bounty to which no such exception could be taken. Forfeitures might be remitted to a loyal subject, or enforced against a troublesome one. The lands and goods of a convicted felon were in much request; and grants of forfeitures were frequently, although illegally, made without waiting for the formality of a conviction. Pardons* were granted without scruple by all our earlier Kings either for money or as a means by which the holder might obtain money. Even in the time of James the Second such grants were saleable commodities. Besides these and many other modes of gratification, the King possessed his legitimate patronage and his power of bestowing titular distinctions.

In such circumstances we may readily conceive the predominating influence of the Crown. It was indeed three or even two centuries ago the fountain of wealth, no less than the fountain of honour. In the limited range of English industry there were then few opportunities for making a fortune. The country was too poor to admit of those great industrial and professional successes with which we now are familiar. For a younger brother of a noble house, for an aspiring man without connections, the most advantageous opening was the public service; and successful public service meant the favour of the Court. In any other sense, indeed, the public service afforded but a small field in comparison with that which it at present presents. The expense to the Tudors and the Stuarts of the navy, of the ordnance, of the diplomatic service, seems to us absurdly small. But the King's personal favourites, his ministers or his favoured courtiers, made enormous gains. It is probable that in the time of Charles the Second the income of the principal minister during his

* Hallam, *Middle Ages*, iii. 168, *note*.

tenure of office far exceeded that of any other subject. The place of Lord-Lieutenant of Ireland* was worth twice the income of the richest duke in England. Clarendon, the members of the Cabal, Danby, each in their turn accumulated immense wealth. At the same time the average income of a peer was about three thousand, and of a baronet about nine hundred, pounds a year; and the barristers who were at the head of their profession never made in any year, unless they were in the service of the Crown, two thousand pounds. It was plain, therefore, what was the shortest road to riches. "This," as Lord Macaulay observes, "is the true explanation of the unscrupulous violence with which the statesmen of that day struggled for office, of the tenacity with which, in spite of vexatious humiliations and dangers, they clung to it, and of the scandalous compliances to which they stooped in order to retain it." Yet this influence, enormous as it undoubtedly was, tended to work its own limitation. A great class of wealthy proprietors was thus formed which became both able and willing to resist the advance of prerogative. Political gratitude is proverbially weak. When even at the present day the steady adherent of a ministry is raised to the Upper House, he often gives but a hesitating support, and still oftener is habitually absent.† It does not always follow that he will continue even to sit with his former friends. There is not the least security that his successor will maintain the old political connection. In like manner very many of the most considerable families in England,‡ whether within or without the limits of the peerage, owe their position to the bounty of the Tudor Kings. Yet although the spoils of the monasteries increased indefinitely the power of Henry the Eighth, his

* Macaulay, *Hist. of Eng.*, i. 309. † See May, *Const. Hist.*, i. 253.
‡ Hallam, *Const. Hist.*, i. 79.

very profusion served to raise a class of men which supplied the leaders of the Opposition in the coming struggle with the Crown.

The latest instance in which the proprietary powers of the Crown were used at once to punish a political opponent and to reward a political supporter occurred in the reign of George the Third.* The old rule of law in relation to a possession adverse to the Crown was "*Nullum tempus occurrit regi.*" By an Act of James the First† all titles were protected from claims of the Crown after a quiet possession of sixty years. But this enactment was only retrospective, and the Crown was consequently not barred as to any claim that it might raise to any land that was not enjoyed for sixty years prior to 19th February, 1623. The Duke of Portland, by a grant to his ancestor Bentinck from William the Third, held the Manor of Penrith, which comprised the forest of Inglewood in the County of Cumberland. This estate brought with it great political influence in the Counties of Cumberland and Westmoreland. The Duke of Portland was a Whig ; the other great territorial magnate in those counties, Sir James Lowther, was a Tory, and was in peculiar favour at Court. Grounds were found for disputing the Duke of Portland's title ; and a lease of the estate, on the understanding that he should litigate the Duke's claim, was granted to Sir James Lowther. To remedy this grievance an Act,‡ which generally bears the name of its chief promoter, Sir George Saville, was passed, but not until the general election was over, by which all claims of the Crown, at whatever period they may have arisen, are barred after an adverse possession of sixty years. A clause, however, was inserted, saving any claims which might be

* See Massey's *Hist. of Eng.*, i. 322.

† 21 James I. c. 2.

‡ 9 Geo. III. c. 16.

prosecuted within a year after the passing of the Act. Under this clause Sir James Lowther commenced a series of proceedings unprecedented in their kind, and amounting almost to a public convulsion. The authority of Parliament was invoked, but unsuccessfully: and ultimately the Inglewood estate remained in good Tory hands.

§ 5. These sources of influence have long passed away. No King of Great Britain has ever granted to a favourite courtier the greater part of a county, or has introduced to a youthful heiress the highest bidder for her hand. But in the room of the fountains that have been thus dried up, others scarcely less copious have been discovered. Since the accession of the House of Hanover every public department has been greatly increased; and many new and important branches of the Public Service have come into existence. The new modes of raising revenue brought with them new modes of collecting it. The Customs, the Excise, the Stamps, the Post-office, and the Income Tax all require for their collection a large staff of skilled officials. The army is entirely of post-revolutionary growth. The navy, for the whole expenses of which in the times of peace £600,000 seemed to the Convention Parliament an ample provision, now requires for its non-effective service more than twice that sum,* and expends in wages alone, and even at a very low rate, upwards of three millions sterling. There are about 40,000 persons engaged in the Civil Service.† There are more than twice that number in the navy; and between three and four times that number in the British army. All these persons hold their places during the pleasure of the Crown; and may be dismissed either

Modern increase of patronage.

* Levi, *On Taxation*, 154. † Levi's *Annals*, ii. 240.

peremptorily and without any reason assigned, or under such regulations as the Crown thinks fit to impose upon itself. Nor is this all. Immense sums are sometimes raised by way of loan; and great public works are undertaken. In all these cases there is ample room for political favour. We have already seen that George the Third distributed in pensions a yearly sum of nearly a quarter of a million; and that the exercise of his bounty was not subject to any restriction. The concurrent operation of all these forces gives the Executive power, as Blackstone observes,* "so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative."

It was, therefore, the policy of the Whig leaders, who fought the battle of the Constitution against the great resources and the settled obstinacy of George the Third, to limit in some degree the Royal influence. They desired, in the words of Mr. Fox,† "to give a good stout blow to the influence of the Crown;" and if that were done, they were content to leave the rest to time. Various attempts were made to effect this object by excluding from the House of Commons those who were within the reach of the predominating power. But although these disabling acts were useful in establishing that distinction between political and non-political officers which I have already noticed, they were insufficient for their intended purpose. I had in a preceding chapter occasion to notice the despair with which the boldest chief of the Opposition regarded, even under the Regency, a contest with the Crown. But there are other grounds from which we may infer both the former greatness of that power and the extent to which that greatness has

* 2 Stephen, *Com.*, 609.

† *Memorials and Correspondence*, i. 316.

departed. In every case, prior to the Reform Act, of what is called an Appeal to the Country, in 1784, in 1807, and in 1831, the Crown obtained a decided majority. In the first quarter of a century after the passing of the Reform Act there were five such dissolutions—in 1835, in 1841, in 1852, in 1857, and in 1859; and the ministry in whose favour the dissolution took place, with the exception of the election of 1857, was invariably defeated.

Why power of Crown not increased.

§ 6. If we seek the means by which this great increase to the power of the Executive Government has been accomplished without an undue extension of the personal authority of the King, we shall find that they consist in something deeper than the creation of a political incapacity. If placemen and pensioners and contractors once abounded in Parliament, the exclusion of these persons from the House of Commons or from the electoral franchise did not diminish the power of granting places or pensions or contracts. The true remedy lay in the proper regulation of this power; and this regulation again was found in dealing with these matters according to their real use, and not for any other purpose. When places were granted for the *bonâ fide* performance of the duties of each place by its incumbent, when pensions were given as the reward of actual merit or as the expression of real sympathy, when contracts were treated as matters of business and not as matters of grace, no degree of influence that could disturb the most timid constitutionalist remained. The great reforms which Burke commenced and which Pitt carried out got rid of the nuisance of offices executed by deputies and of menial services nominally rendered by noblemen. The turnspit* of the King's

* See Burke's *Works*, iii. 371.

kitchen was no longer either a member of Parliament or a person in the rank of a member of Parliament. When the old excuses for corruption were abolished, when the Royal household and the Public Service were rendered at least comparatively efficient, the course of influence was checked. Probably this test of efficiency will be found the great safeguard against political favour, and the great protector of the Public Service. The patronage of the Crown, whether it be dispensed by the King himself or by a minister, can never do much harm, if precaution be taken either by the previous application of a reasonable educational test or otherwise that it shall not be extended to undeserving persons. Thus, too, Lord Rockingham and his party conceived that they had effected a great reform when they disfranchised revenue officers. Lord Rockingham declared that, by the votes of the revenue officials, the Crown had a predominating influence in seventy boroughs. But the evil was more deeply seated than the Whig statesman seems to have supposed. It sprang not from the rights of the servants of the Crown, but from the abuses of the electoral system. If there were seventy boroughs which could be secured by the presence of so small a body as the officers of revenue, and if their representation continued to be an object of desire to the Crown, and if the Crown had sufficient funds at its disposal, it was sure soon to find new means of controlling the elections. It was not until such boroughs were abolished, or at least rendered less manageable, and until the pecuniary resources of the Crown were subjected to control, that this evil was completely removed.

This method of extirpation was successfully applied by Mr. Pitt to another case with which Lord Rockingham had tried his feeble palliatives. By an Act passed in 1782 contractors were excluded from the House of Commons.

But no attempt was made to check the practice of using for purposes of patronage contracts whether for loans of money or for the execution of public works. The abuse of these contracts, not so much by the King as by his servants, had been almost incredible. Even Mr. Fox seemed to regard them as legitimate sources of ministerial patronage, and only complained of their abuse. But with prudent boldness Mr. Pitt ventured to discard these dangerous supports. When he required his first loan, he gave notice that he would contract for the loan with those who offered the lowest tenders. He opened the sealed tenders in the presence of the Governor and Deputy-Governor of the Bank of England, and at once accepted the lowest offer for the entire amount.* The example thus set has served as a precedent and a model for all subsequent transactions of the kind. The same remarks apply to pensions. There was one way, and one way only, of dealing with them. The gross sum available for pensions was limited; and its distribution was put under stringent regulations.

Thus during the early part of the reign of William the Fourth two great constitutional changes were effected which concurrently reduced the authority of the King. By the Reform Act the constituencies were so purified and enlarged as to be at least in a less degree than formerly within the reach of "the persuasive energy" of the Crown. By the regulation of the Civil List the chief source of that energy was removed. Nothing now remains to the Crown except the regulated exercise of its patronage, and the distribution of its honours. Even these resources have lost much of their original power. Not merely has the number of political offices been diminished, but the emoluments of those offices which remain have

* Earl Stanhope's *Life of Pitt*, i. 220.

been greatly reduced. Even in the seventeenth century a statesman who was at the head of affairs might easily and without disrepute acquire * in no long time a fortune sufficient to support a dukedom. The salary of a minister of state was at the Revolution at least twice as great as the average income of a peer. Commissioners of Customs and Lords of the Bedchamber received at least fifty per cent. more than the average income of a member of the House of Commons. The regular salary, however, was the smallest part of the gains of an official in that age. What we should now call gross corruption was then practised without disguise and without reproach. "Titles, places, commissions, pardons, were daily sold in market overt by the highest dignitaries of the realm; and every clerk in every department imitated to the best of his power the evil example."† Out of the disasters and the profligate expenditure of the American war a great change arose.‡ A new spirit was infused into the Government by the popular movement of 1780. A systematic order in the public finances was gradually introduced; and a sense of personal integrity, unknown either in our previous history or in the administration of most other countries, became confirmed. All irregular gains were cut off. Official incomes and official duties were revised. Since the Peace of 1815 the wealth of the country has advanced with such rapidity that the gains of private life far surpass the gains of office. At the present time there is hardly any political office which the majority of members of Parliament would, for the sake only of the salary, desire to have. Most of such offices, so far from being profitable, actually involve expense. Salaries have been reduced, while the rate of social expenditure has increased; and at the same time

* Macaulay, *Hist. of Eng.*, i. 309. † *Ib.*

‡ Earl Russell, *Life of Fox*, i. 227.

the men who are now returned to the House of Commons are usually so wealthy or so profitably engaged in their private affairs that they are reluctant in any circumstances to accept office. The influence, therefore, of Government has visibly decreased. So completely has the fear which haunted our grandfathers been dissipated that a few years ago the unlawful presence of five Under Secretaries in the House of Commons, to which four only are admissible, was generally regarded as an amusing blunder, and not as a matter of the slightest political importance. Such an incident would have excited very different feelings if it had happened eighty or ninety years ago, under the administration of Lord North and not of Lord Palmerston.

So great has been the reduction of the Parliamentary influence of the Crown that some persons have thought that it is tending to produce, if it have not already produced, an organic change in the Constitution. They suppose that the administration ought always to command a majority in the House of Commons ; and that a majority can only be obtained by exchanging patronage for support. Further, they hold that this barter was greatly facilitated by the small boroughs which the Reform Act swept away ; and accordingly they were at the time unable to understand how after that measure "the King's Government was in future to be carried on." This esoteric doctrine of the Tory party, as it has been well called, has found an unexpected supporter in Earl Grey.* In his view the loose and uncertain ties of party, and the varied and often unreasonable motives that influence public men, require some stronger means of cohesion ; and he thinks that in the reaction against former abuses we have in the usual manner run into the opposite extreme. Yet this opinion,

* *Parl. Govt.*, 99.

notwithstanding the respect to which Earl Grey's authority is justly entitled, may well be doubted. The theory which permits the Executive to tamper with the body assigned for its control by the Constitution is indefensible.* The means by which the theory is carried into effect are vicious. The strength which is thus obtained is, as experience has amply shown, precarious, unstable, and unpopular. The inconveniences, so far as they are real, of the present system are either merely incidental to the transition from one state of things to a different state, or arise from the undue extension of Executive interference in matters that properly pertain to the Legislature alone. But it is probable that these evils are exaggerated. The old Governments were not always strong; the modern Governments are not always weak. Before the Reform Act, when public opinion was definite and decided, the ministry was strong; when public opinion is definite and decided, the ministry is strong now. No ministry in the days of unreformed Parliaments was stronger than that of Sir Robert Peel in 1841 or of Lord Palmerston in 1857. But of all the numerous administrations of George the Third the only strong ones were that of Mr. Pitt, and that which under various chiefs conducted to its close the great contest with Napoleon. Of Mr. Pitt's first Parliament, that which overwhelmed the forces of the Coalition, contemporary politicians said "that it was a very loose Parliament, and that Government had not a decisive hold upon it on any material question." † In 1810 the Duke of Westminster contemptuously denies the Perceval Administration to be a Government; ‡ and asks what support could be expected from ministers that are beaten in the House of Commons

* See *National Review*, x. 240.

† Earl Stanhope's *Life of Pitt*, i. 288.

‡ Sir G. C. Lewis's *Administrations*, 322.

three times a week. Some years afterwards we find the same illustrious person, then a leading member of the administration, complaining bitterly of the conduct of his supporters. He says* "that the country gentlemen not only give individual votes against the Government," but "act in concert and as a party independent of and without consultation with the Government which they profess to support but really oppose;" and he declares that a sense of duty alone in the peculiar circumstances of the time induced him to retain his office. On several occasions indeed that administration,† so far from being a model of strength, seems to have been in a most precarious position.

We may well believe that, partly in the exercise of the just and essential prerogatives of the Crown, and partly from the public sympathy and support which an efficient and conscientious performance of their duties is sure to obtain, a ministry of the present day has all the authority in Parliament that it needs or that it ought to possess. The actual organization of the administration and its political unity necessarily give it great influence; and its strength would probably be increased if it were understood that nothing short of a direct vote of want of confidence or a defeat on some question of unusual magnitude should cause a ministerial resignation. It must not be forgotten that our system of Parliamentary Government, and especially its latest development, is still very young; and that the general tone of public morality has within the last century experienced an extraordinary improvement. We are not to look back to the machinery of an obsolete system for the means of curing our defects. We ought rather to look forward for their remedy to that higher and better moral tone which we may reasonably expect. We need not therefore fear

* Duke of Buckingham's *Memoirs of Court of Geo. IV.*, i. 292.

† *Ib.* 293, 295.

even a further diminution of this influence by better regulations for the Public Service. The real question is merely the benefit of the service. If that be secured, the old truth that corruption wins not more than honesty will approve itself. "There is no real cause," says Mr. Hallam,* "to apprehend that a virtuous and enlightened Government would find difficulty in resting upon the reputation justly due to it, especially when we throw into the scale that species of influence which must ever subsist, the sentiment of respect and loyalty to a Sovereign, of friendship and gratitude to a minister, of habitual confidence in those entrusted with power, of aversion to confusion and untried change, which have in fact more extensive operation than any sordid motives, and which must almost always render them unnecessary."

§ 7. A result, which I have already had occasion to notice, of the separation of the personal and the official revenue, if I may so speak, of the Crown is the comparative facility with which many important legislative reforms can now be made. In former times the interest of the King was a direct obstacle to almost every project of improvement. Edward the First objected to the free alienation of land because it tended to increase the number of his tenants who held not directly from the Crown but through the medium of some tenant in chief. Henry the Eighth objected to the free devising of land because he was thereby greatly wronged in the collection of his wardships and of his primer seisins. He proposed as a compromise to give a testamentary power over half the testator's lands in consideration of the Royal rights being

Advantages to Crown from modern financial system.

* *Const. Hist.*, iii. 264.

secured over the remaining half. "Therefore," he said to the Commons,* "if you do not take a reasonable thing when it is offered, I will search out the extremity of the law, and then I will not offer so much again." Accordingly, when there was a reluctance to accept his proposal, he attempted by the Statute of Uses to abolish altogether wills of real estate. The interest of the Crown in the fines imposed by the Star Chamber seems both to have aggravated the punishments which that court inflicted and to have induced convictions on insufficient proof.† We have seen with what difficulty and after what negotiations the military tenures and their mischievous incidents were, even with the payment of ample compensation, extirpated. James the First and Charles the First freely used prohibitory proclamations as a means of raising revenue, either by fine or by dispensation.‡ When in the reign of Charles the Second private enterprise had started in London a penny post, the undertaking was adjudged to be an infraction of the Duke of York's monoply of the Post-office. A question of revenue interfered in the reign of William the Third with the proper settlement of the Judges' salaries. So in the case of statutory penalties the personal interest of the King was a formidable impediment to the repeal or alteration of any Act by which they were imposed. Thus, not only were penalties preserved after it was felt that they had become unreasonable, but they tended to protect laws which, apart from any severity in their administration, were politically inexpedient.§ In the administration, too, of such laws, and in the enforcement of escheats and forfeitures, the King had a direct personal

* See Amos, *Statutes of Henry VIII.*, 116.

† Hallam, *Const. Hist.*, ii. 35.

‡ *Ib.*, i. 337, *note*; ii. 24; Gardiner, *Hist. of Eng.*, ii. 194.

§ Amos, *Eng. Const.*, 223.

interest in severity. At the present day Her Majesty may retain all the gratitude and all the admiration which spring up so luxuriantly beneath the gentle rain of mercy, but she is personally not one farthing poorer though she restore an escheated county or remit the forfeiture of a gold mine. Even in modern times the personal interest of the King is readily supposed to influence his policy. The surrender of the hereditary revenues by George the Third did not, as I have already stated, include certain casual revenues, amongst others the Droits of the Admiralty or certain lucrative rights arising out of the capture of hostile vessels in war. It was impossible to convince American* statesmen of the day that the war between their country and the United Kingdom in 1812 was not at all events encouraged and prolonged by the Prince Regent on account of the pecuniary advantage which he derived from it.

Another advantage which this arrangement has brought to the Crown is the relief from the necessity of personally contracting debt. Our former Kings used, like any private person, to raise money when they required it by their own authority and upon their own security. Our Kings, indeed, have been regular, if not always satisfactory, customers to money-lenders. Sometimes the necessities of war or other public exigencies, more frequently their personal extravagance, compelled them to borrow. On such occasions they borrowed, so far as they could, upon their personal credit under the forms of tallies, debentures, privy seals, and even letters patent. If these expedients failed, they gave such security as it was in their power to give. But transactions with a Royal debtor were always difficult. He was so over-protected by law that his credit was little more than that which his mere promise could produce. The immediate

* Miss Martineau's *Introduction to the History of the Peace*, cccxiv.

pressure of present wants often proved too hard even for Royal promises. The King, too, at least the Plantagenets and the Tudors, paid no interest. Usury was probably unlawful, and certainly disreputable; and it is not likely that the King would, by his example, sanction so inconvenient a practice. Accordingly, some of our Kings have been reduced to considerable straits.* On some occasions indeed there happened something like a Royal insolvency. His obsequious Parliament did not refuse to Henry the Eighth the pleasure of the sponge; and freely forgave His Majesty all the debts that he owed to any of his subjects. Charles the Second stopped payment for about thirteen hundred thousand pounds; and although he allowed interest, after some years the payment of the interest was discontinued. Both these failures caused, as all large failures must cause, great individual suffering; and these evil consequences were not diminished when they were attributed directly to the King. There can indeed, as Lord Macaulay† has remarked, be no greater error than to imagine that the device of meeting the exigency of the state by loans was imported into our island by William the Third. From a period of immemorial antiquity it has been the practice of every English Government to contract debts. What the Revolution introduced was the practice of honestly paying them. But it must be remembered that it was at the Revolution that the war charges were removed from the hereditary revenue; and that the new practice of appropriating the supplies naturally led to the mortgage of funds raised by specific Acts. Without the system of finance which was established at the Revolution no money could have been raised. With that system it was a mere question of convenience; and the temptations to dishonesty

* See Levi's *Annals*, vii. 408. † *Hist. of Eng.*, i. 288.

were entirely removed. It is remarkable how, with each step of these changes, the Royal tendency to debt has decreased. Prior to the Revolution financial difficulties were the normal state. When the Civil List was still charged with matters which properly belonged to the Public Service, applications were frequently made to Parliament to discharge the debts that had accrued upon it. Since the complete rearrangement of the Royal revenue, Parliament has never* been asked to entertain any such application.

* May, *Const. Hist.*, i. 206.

CHAPTER XV.

THE EVOLUTION OF PARLIAMENT.

The King in his Great Council.

§ 1. The influence of the Royal revenue in promoting the healthy exercise of political functions is not the only point of constitutional interest in its history. That history is intimately connected with the actual structure of our political organism. Its aid is needed if we desire to trace the development of our Parliamentary system, of our representative institutions, and of our practice of self-taxation. Of these fundamental portions of our polity, the foundations must be sought in feudalism and in those pecuniary relations between our King and his subjects to which feudalism gave rise. These relations have, in a preceding chapter, been, for my present purpose, sufficiently described. We were then concerned with them as they affected the proprietary condition of the King. It now remains to consider them in their political aspect. We cannot expect to find in an early period of our history any very strict division of political functions. Such a separation is the product and the characteristic of a later and a higher development. But we ought to be able to trace in the customs of our ancestors the germs which have subsequently expanded into our modern Constitution. We find, accordingly, in the very earliest accounts of the Teutonic tribes,

that the Government was exercised by a King, with the advice and consent of his assembled nobles. This primitive polity lasted through several centuries. The Witena Gemote was essentially an aristocratic assembly. Its name merely, but not its constitution, was changed by the Conquest. Both then, and for two centuries after that event, all affairs of state were transacted by the King, with the assistance, in the first instance and at all times, of his more immediate and confidential servants, and, at stated intervals, of his full court. Two points as to the character of these councils seem to be now established. The first is, that the Proceres, or Optimates, or Magnates (for all these names are used)—that is, the higher and wealthier nobles, both spiritual and lay—had alone a deliberative voice in these assemblies. The second is, that it was the will of the King* that gave efficacy to their acts. It may, therefore, be asserted† that, so late at least as the thirteenth century, the Government of England was administered by the King, with a council consisting of the higher clergy and the great landed proprietors of the country. In this council judicial business and affairs of state were transacted, and in this council such new laws as might be required were enacted. But both in the thirteenth century, and even, as we have already seen, at a much later period, legislation was very limited. Few changes were made in the customary laws of the land by any legislative interference from the time of the Conqueror to the accession of Edward the First.‡ The good customs of the country were sufficient for the people; and although these customs were modified by judicial explanation, no intention seems to have on any side existed of any general and premeditated innovation. All ranks lived according to their customary law and within its limits, and

* 1 Spence, *Eq. Jur.*, 103. † 1 *Lords' Reports*, 473. ‡ *Ib.*, 97.

all ranks seem to have considered that the duty of the King and his court was to administer that law as it had been handed down to him, and not to change it. But a fundamental portion of that law was the protection it afforded to all proprietary rights, and especially the sanctity and inviolability with which it regarded the freehold. It was felt also that ample provision had been made by the law for the state and dignity of the Crown. The idea of national action was then little understood. If the King made peace or war, or incurred any unusual expense in the administration of justice, he did so at his own cost, and in the exercise of his own discretion in the expenditure of his own money. His position cast on him certain duties ; and his Royal estates were charged with the performance of these duties. The Legislature therefore seems never to have claimed any general powers of taxation. The law which gave the King his Royal domains protected the subject in the enjoyment of his inheritance. If the King desired further means, whether for any public service or for his personal needs, the law required him to appeal to the interests or to the kindly feelings and the liberality of his tenants. Such an appeal would of course extend to tenants of every degree. The assemblies, therefore, for taxation were distinct from the assemblies for government or legislation.

§ 2. These financial assemblies were as numerous as there were classes of men at that time in the kingdom. The first both in rank and in importance was the Assembly of Military Tenants, the "Community of the Realm" as by way of excellence it is frequently called. Theoretically, at least, the consent of the whole of this body seems to have been required for any change in legislation, although it is difficult to believe that all its

Financial Assemblies.

members did actually attend for the transaction of legislative business. But they were all required to attend when matters of finance were under discussion ; and those who might be absent were held to be bound by the vote of the assembly as actually formed. The second assembly was that of the clergy. The Councils of the Church were formed in accordance with its own canons, and consisted of its hierarchy. The bishops and other spiritual lords held their temporalities by lay tenure, and were subject to most of the consequences of that tenure. But the parochial and other inferior clergy held their lands in frankalmoigne ; and were exempt * from all feudal obligations and all liability to taxation. It was an object of great importance to the Crown to render this large and wealthy body contributory, to some extent at least, to the Royal wants. But the King had no colour of right to take their money ; and any such attempt would be promptly opposed and fiercely resented. The consent, therefore, of the Churchmen was in a peculiar degree required, if the King sought their assistance ; and we know that it was to give that consent that the earliest of these ecclesiastical assemblies on record was convened. Separate from either the military tenants or the clergy were the tenants in ancient demesne. The position of these tenants was peculiar. It was not competent for them to refuse a gift to the Crown. The amount of their compulsory contribution was assessed by the Royal officers. It was at length discovered that a voluntary contribution was a more convenient mode of levying the tax than an official assessment. It happened that the ancient demesne included almost all the principal cities and towns in England. The mercantile interest not only formed a tempting subject for taxation, but also possessed peculiar knowledge

* Madox, *Hist. Ex.*, i. 670.

which the King desired to use. Thus the third assembly made its appearance as the representatives not of the tenants in ancient demesne, but of the most important section of them, the citizens and burgesses.

In the dealings of the King with his military tenants we find a distinction not in itself of much moment, yet leading to highly important results.* It had been the custom of the King personally to receive their reliefs as they became due from his tenants who held upwards of six manors. Those tenants whose holdings did not reach this extent made their payments to the sheriff. A similar distinction,† founded probably on the same reason but not always concurrent with the Parliamentary distinction, existed in the mode of the demand for the performance of military services. When the King required the attendance of his military tenants in the field, special writs were issued to those tenants apparently who were of distinguished rank.‡ Writs were at the same time issued to the sheriffs, directing them to summon generally all those who owed service to the King to give the proper attendance. The larger escheats also were specially let to farm, while for the smaller the sheriff accounted.§ The King therefore, in convening an assembly for supply, summoned individually by his own writ the grandees with whom he was habitually in direct correspondence. At the same time he commanded the sheriff, through whom all his dealings with his smaller tenants were conducted, to summon each of these smaller tenants within their respective counties to attend at the time and place and for the business specified in the writ to the sheriff. Each of these military tenants, whether great

* See 1 Spence, *Eq. Jur.*, 40, 94, *note*: Hallam's *Middle Ages*, iii. 211; and for a further authority from *Domesday*, see Ellis, *Introduction to Domesday*, i. 272.

† 1 *Lords' Report*, 91. ‡ *Ib.*, 461. § Madox, *Hist. Ex.*, i. 299, 300.

or small, was therefore entitled and bound to attend; and each, although their general influence and the mode in which their presence was required were very different, possessed an equal voice. One, accordingly, of the most striking sections in the Great Charter of John made provision for the due summons according to their degree of the greater and the less barons.* The purpose for which they were convened was declared to be the assessment of scutages and of aids beyond the three aids which were ascertained by law. But this Charter does not even hint at any legislative or administrative duties performed by this assembly. On the contrary, during this famous dispute neither party proposed a reference of their differences to any legislative assembly, whether convened under the existing law or under any newly devised form, by which the sanction of the national authority might be obtained.† Nor does the Charter contain any reference to any assembly for purposes of general legislation, or any provision for the subsequent creation of any such assembly.

A still more remarkable fact in the history of the Great Charter is that in the Charter of Henry the Third, which was granted during the minority of the King and under the administration of the Earl of Pembroke, one of the Chiefs of Runingmede, these very clauses respecting scutages and aids are omitted. They are described in the latter Charter as "grave and doubtful," and are accordingly reserved for further consideration. In the Charter as finally

* Shakespeare seems to have been familiar with the *Barones majores et minores* :—

"Now, when the lords and barons of the realm
Perceived Northumberland did lean to him,
The *more and less* came in with cap and knee."—1 *Henry IV.*, iv., 3.

"And *more and less* do flock to follow him."—2 *Henry IV.*, i., 1, 209.

"Both *more and less* have given him the revolt."—*Macbeth*, v., 4, 10.

† *Lords' Report*, 63.

amended in the ninth year of Henry the Third all notice of these clauses is omitted; and it is directed that scutage should be taken according to the rates used in the time of Henry the Second. So little importance seems to have been attached to this change that the contemporary historian Matthew Paris* appears to have been altogether unaware of the fact; and describes the two Charters as being in all respects alike. So far as it relates to scutage, the change is easily explained. Scutage was a commutation for military service, and was in the nature of a Royal indulgence. The service formed a legal obligation which, or the equivalent of which, the military tenants were bound to render. The aids, on the contrary, were free gifts. There was no reason, then, why the tenants *in capite* should assess the sum at which their exemption from service should be valued. If they objected to the amount fixed by the Crown, they had the alternative of rendering their stipulated service in the field. But the Crown or its advisers could never have intended to weaken the right of the tenants to give or to withhold the voluntary aids, or their right to ascertain the amount or the form of their gift. It must have been supposed that that right was secured by former Charters and general usage. But it is probable that the greater Barons did not approve of the equality of the suffrage claimed by the smaller tenants of the Crown. This equality, so offensive to the great lords, was probably not felt in practice to be inconvenient, when the attendance of the minor Barons was scanty and irregular. It may well, however, have been doubted whether means should be taken not only to induce, but to compel, the attendance of all the tenants of the Crown.† No effectual or permanent compromise could be made

* *Lond. Paris*, 79. † Hallam, *Middle Ages*, iii. 215.

but by representation; and the hour for representation, although at hand, was not yet come.

§ 3. The origin and the principles of our Representative System form the subject of a separate chapter. For the present purpose the fact of their existence may be assumed. Perhaps the success of representation in the assemblies of the military tenants for supply, perhaps the example of Spain and the King's Spanish connections, perhaps the increase of wealth and the growing spirit of freedom since the meeting at Runingmede, or, perhaps, the concurrent influence of all these considerations, may have induced Edward the First to adopt the representative principle as a political not less than a financial instrument. Whatever may have been his motives, it is certain that Edward sought, with the aid of this principle, to give a new character to the existing political machinery. A man of rare natural endowments, who had seen the cities and manners of many men, he was resolved to rescue his kingdom from the disorder into which it had fallen during his feeble father's protracted reign. He, therefore, contemplated large measures of reform, and was, consequently, obliged to consider the means of accomplishing them. It was no part of his design to carry his changes, however beneficial, with a high hand. In words that well became the noble King of a free people, he acknowledged that "what touched all should be approved by all." But these words conveyed a different meaning in the thirteenth century from that which they imply in the nineteenth. In those earlier days the cohesion of our national elements was still imperfect. It is only in an advanced state of political development that the social organism exhibits that interdependence of its various parts which binds them, whether for good or evil, into one

Financial Assemblies become political councils.

national life. Five centuries ago the divisions of society, now so minute and so intertwined, were few and distinct. There was little in common between the Burgher and the Knight. There was still less sympathy between these two classes and the Cleric. The general interest, therefore, and the general approbation, which were assumed to be inseparable, were the interest and the approbation of each great class of the community. Each class was concerned in its own affairs; and was neither competent nor desirous to interfere with the affairs of others. Edward, accordingly, seems to have designed to establish Councils of Advice for each of the great interests that then existed in the kingdom. While he retained his own authority and the services of his Great Council for legislation, he invited* the assistance of all the tenants of the Crown, either personally or through their representatives, on all questions relating to estates and tenures; of the clergy in like manner on all questions relating to ecclesiastical affairs; and of the citizens and burgesses, through their representatives, on all matters relating to trade and commerce. It had at all times been the duty of these several classes to meet for the purpose of considering the wants of the King and the propriety of affording him pecuniary assistance. They were now asked under a more complete organization to perform the additional function of giving to their Sovereign information and advice as to their own respective wants and the means of their satisfaction. Thus out of the financial assemblies Edward formed special consultative bodies, each dealing exclusively with its special class of subjects. In legislating upon these several subjects he sought the advice of the appropriate assembly, although the legislation still proceeded from the King and his council. But in matters

* See Guizot, *Rep. Govt.*, 420.

not directly affecting any of these classes, or when no charge was directly imposed upon any of them, the King in his council was free to legislate as he thought fit.

No formal recognition of the changes thus introduced by Edward is found in any documents of the period that have come down to us. But these documents furnish evidence favourable to the view I have attempted to indicate. The writ by which in 1295 the clergy were convened recites and adopts the principle that what touches all should be approved by all. The same principle is emphatically asserted in an official letter in the same reign from the Archbishop of Canterbury to the Pope. Not long afterwards* the kindred and complemental maxim that community of danger requires community of sacrifice was recognized. It seems, therefore, to have become a settled constitutional principle that in any change or other important question those persons whose interests were directly affected should be consulted. In accordance with this doctrine it might be expected that the King in Council would not exercise his power of legislation on any subject directly affecting any class without previous consultation with the persons who were qualified to express the sentiments of that class. But as the Legislative power still resided in the King and his council, it was also probable that he would seek for advice from each class in its own concerns exclusively; and would, therefore, transact business separately with each assembly. These antecedent probabilities are confirmed by the facts of which we still possess the records. The several assemblies met during the reign of Edward the First frequently, if not invariably, at different times and in different places. Their respective grants of money were made independently of each other,

* 11 Edw. III., Parry's *Parliaments*, 106.

and generally for different amounts. Laws, too, were made, apparently at the request or with the consent of one only of these assemblies, and without the presence or the consent of the others. The ordinance* upon which was founded the *Magna*, or as it was afterwards called the *Antiqua, Custuma*—that is, an export duty upon wool, woolfells, and hides—was granted by the "graunz" of the realm upon the prayer of the "commune des marchands." In a charter of the following year granted in full Parliament at Westminster and extending these duties to Ireland, this grant is described as having been made by the archbishops and other prelates, earls, barons, and "communitates" of the Kingdom of England.† While the military tenants in 1283 were sitting at Shrewsbury as a court to try for treason their fellow-vassal David Prince of Wales, the citizens and burgesses were deliberating at Acton Burnel on reforms in Mercantile Law. In the autumn of 1294 successive meetings of these various bodies were held, apparently for the transaction of different business, with a brief interval between each meeting.‡ When the object of their meeting was merely financial, their action seems to have invariably been independent. Through the whole reign of Edward the First the clergy, the military tenants, and the townsmen appear to have made separate grants, often at different times, and usually of different amounts. In 1295 § the clergy gave a tenth of their ecclesiastical revenues; the earls, barons, knights, and other tenants granted an eleventh, and the citizens and burgesses granted a seventh, of all their movables. In the following year the citizens and burgesses granted an eighth, and the earls barons and knights a twelfth; but the clergy, in obedience to a Papal Bull, refused to make any grant, and were thereupon placed

* 3 Edw. I. † Palgrave's *Parl. Writs*, I.
‡ Parry's *Parliaments*, 50. § *Ib.*, 58.

out of the King's protection and defence. Even among the towns a further difference appears. The city of London sometimes made a separate grant. The Cinque Ports, which were exempt from tallage, were not summoned, except on judicial business, from the time of De Montfort's Parliament to the reign of Edward the Third.* In legislative deliberations the difference between the assembly of citizens and burgesses and the other assemblies is clearly marked. The statute *De Mercatoribus*† was passed while, as I have already observed, the military tenants were engaged elsewhere. Neither the clergy nor the citizens and burgesses appear to have been consulted respecting the great Statutes of *De Donis* and *Quia Emptores*. But in cases of a purely political nature, such as the Statute‡ of Wales or the Ordinance for the State of Ireland§ or the Statute *de Prisonibus prisonam frangentibus*‖ or *de Finibus Levatis* or *de Falsa Moneta*¶ or the Statute concerning the lands of the Templars,** the King with his council appears to have enacted laws without any further consultation. On the other hand, when special interests not included in the existing assemblies were concerned, the principle of consent was applied. Welshmen were consulted on the affairs of Wales;†† and Irish representatives were summoned to Parliament for the consideration of Irish affairs.‡‡

Thus it appears that the theory of the Constitution required for every change in the law the consent of the persons directly affected by it: and that, both from the incomplete state of the national integration and from their various relations to the King, at whose command and for

* Parry's *Parliaments*, 45. † 11 Edw. I.
‡ 12 Edw. I. § 31 Edw. III.; 1 *Lords' Report*, 326.
‖ 23 Edw. I. St. 1, c. 1: 1 *Lords' Report*, 217.
¶ 27 Edw. I. St. 3; 1 *Lords' Report*, 236.
** 17 Edw. II.: 1 *Lords' Report*, 285.
†† See N. Bacon, *Hist. Disc. on Gov. of Eng.*, ii. 242. ‡‡ 4 *Inst.*, 350.

whose assistance they came, certain classes were regarded as separate and independent bodies. This state of facts seems necessarily to involve the existence of separate assemblies for legislative purposes. Such assemblies, representing these several classes, did actually meet in different places at different times and for the transaction of different business. They made separate grants to the King; they presented separate petitions; they advised the enactment of separate laws. Traces of their separate action may be observed, as we shall see, at a period long after these bodies had assumed their present form.

Integration of House of Commons.

§ 4. One of the questions which most frequently attract attention in our early political history is the separation of the two Houses of Parliament. Yet this question, which seems both so interesting and so difficult, is really immaterial. The evolution of Parliament has proceeded not by differentiation but by integration. Adjacent parts of our political system engaged in the performance of like functions have coalesced; and some portions of it have waxed, while others their competitors have dwindled. The Lords and the Commons can hardly be said to have been separated, for they were never united. But the circumstances which led to the consolidation of that composite body which we now call the House of Commons deserve our fullest attention. We have seen that in the time of Edward the First several political assemblies attended upon the King. These assemblies had respectively a twofold function. They were required to advise the King on all matters relating to the interests of the particular class to which they belonged or for which they appeared. They were also and more often required to supply the pecuniary wants of the Crown. As consultative bodies, they either considered the proposals of the

King in council, or they presented to him their petitions for reform. As financial bodies, they granted for themselves and their constituents a supply to the Crown, and determined the ways and means by which that supply should be raised. But all power of general legislation rested with the King and the Great Council of his Prelates, Earls, and Barons.

With this powerful body the citizens and burgesses never for a moment thought of mingling. On certain matters which affected their common interest, although not on any other matter, the Knights of the shires had an equal voice with their wealthier brethren. On all questions of tenure or other matters incidental thereto the Knights were interested not less than the greater Barons, and were therefore consulted. In all grants of aid which the Knights might make, the greater military tenants who practically formed the council were concerned, and were therefore required to assent. But although the greater Barons and the Knights were thus connected, there was a great gulf fixed between them. Not merely was there a wide disparity in their respective wealth and social influence, but claims had arisen to a legal distinction which were expressly recognized early in the reign of Edward the Third. The one body, too, formed the King's Great Council of State;* and its members were consulted on every important occasion whether of general legislation or of administrative policy. The deliberative functions of the others, as I have said, were limited at most to their own direct interests. There was also the broad difference in their attendance. The one body was convened by special writ addressed by the King to each member personally. The other body sat by way of representation. A clear

* See 1 *Lords' Report*, 320.

distinction was thus drawn between the two orders, notwithstanding their points of agreement. The great Lords therefore had no inducement to abandon their character as members of the Great Council, and to merge into members of the Council of Military Tenants. If any proposal came from the King, it had been in the first instance considered and adopted by them. If a petition were presented by the Knights, its prayer could not be granted without the advice of the Council of Lords. It is probable that the analogy of these proceedings was followed in the case of grants. As the two bodies were accustomed to deliberate separately in other matters, so they sat apart when they met to vote an aid. And whether that it was thought that the poorer should speak first on such a subject, or that the usage of not acting in other matters without a petition from the inferior body had been established, the practice became confirmed that the Lords should merely assent to or reject the financial proposals of the representative body, and that they should not originate any money bill. Accordingly we find the grants continually expressed to be made by the assent of the Prelates and Lords; and in the reign of Henry the Fourth* the present practice received a distinct Parliamentary recognition. While the Lords thus abandoned their position as members of the Assembly of Military Tenants, and merged their inferior rights in the higher privileges which attached to the Great Council of the Crown, the representative portion of the Military Tenants formed exclusively the body whose assistance and advice, in addition to that of his council, the King required in all his dealings, whether pecuniary or legislative, with his tenants *in capite*.

* 9 Henry IV. *The Indemnity of the Lords and Commons*, *Rot. Parl.*, iii. 611.

The Knights of the shires were not the only representative body that attended on the King in Parliament. There were also the representatives of the citizens and of the burgesses. Between these two bodies, notwithstanding the difference of their rank, there were points in common. They appeared in the same representative character. They had in relation to their respective departments the same functions; and they stood in the same relation to the King and his Lords. Sometimes, too, the interests of the county and of the towns that it contained would coincide; and sometimes questions, such as the tax upon wool, would arise in which both counties and towns had a common and direct interest.* Between bodies which were thus brought together at the same place and the same time, whose origin and whose functions were similar, whose differences of rank, though conspicuous at home, were eclipsed at Westminster by the overpowering shadow of Royalty and its grandees, whose interests were often the same, and whose very position suggested co-operation, there was a strong tendency to coalesce. No formal act of union between them is recorded. They seem to have deliberated together and to have presented joint petitions for redress of grievances, while still they retained in matters of supply and in questions specially affecting their own class their right of independent action. The first recorded instance, so far as I am aware, of their joint deliberation, although not of their joint petitions, occurs in the sixth year of Edward the Third.† The frequent exercise of these functions during that reign led to more settled practice and more definite customs. At length, towards the end of Edward's long reign,‡ two events occurred of no small significance. One was the

* See 1 *Lords' Report*, 321. † *Ib.*, 306. ‡ 51 Edw. III.

appointment of a permanent Speaker ;* the other was the imposition of a poll tax upon every adult person in the kingdom except mere beggars. The former event marks the complete consolidation of the separate assemblies into the House of Commons. The latter event marks the fusion of the separate tax-paying classes into a united nation.

§ 5. I have hitherto spoken of the Knights and the citizens and burgesses. But there still remains another constitutional assembly, similar in its origin, its structure, and its functions to the other representative bodies, but very dissimilar in its history and its fate. This was the assembly for ecclesiastical affairs. Some ten years before the Parliament of De Montfort we find representatives acting for the lower clergy. The function of these representatives was the same as that of the early representatives of the secular Commons. The duty of each assembly was to make a grant to the King. I have already said that Edward the First dealt with this ecclesiastical assembly in the same manner in which he dealt with the other representative assemblies. He retained it for its original purposes of taxation ; and he added to it the duty of advising him upon matters connected with the Church. Every Bishop was by his writ of summons directed to cause the Dean of his Cathedral Church, the Archdeacon of his diocese, with one proctor from the chapter of the former and two from the body of the clergy, to attend with him at the place at which Parliament was to meet. This command (usually known from its initial word as the *Premunientes* clause in the writ) continued to be obeyed till the Reformation ; at least proctors were

The Clergy as an estate.

* Sir Thomas Hungerford was the first who held this office (Hallam, *Middle Ages*, iii. 58).

elected and their names returned on the writ, although the persons so elected had for more than a century before that event ceased to attend. Since that time the form of election has been discontinued; but (such is the force of custom) the premunient clause is still addressed to every Bishop that is summoned to the House of Peers.

So complete has been the change in the position of the Clergy, that at the present day few even of well-informed persons are aware of its extent. Although the expression "the three Estates of the Realm" is sufficiently familiar, we forget that one of these estates has long since disappeared. To account for the old familiar three, some persons, contrary to all authority,* include the King as an estate. Others with little better reason divide the House of Peers, and complete the required number by the aid of the Lords Spiritual. But the real third estate was the Clergy—not the Bishops merely, but the whole body of clerics, although they have been long absorbed into the general mass of the Commons. When it was too late, when the power of Convocation was broken, and the supremacy of the Crown and the authority of Parliament were established, the Clergy saw the full extent of their loss. They sought to fall back upon the King's writ and the premunient clause; and petitioned to be associated with the House of Commons.† For this demand they had not the slightest foundation. They had never formed a part of the House of Commons. Before the amalgamation from which that House sprang was completed, the Clergy had voluntarily abandoned their co-ordinate position, and had elected to be an Ecclesiastical Assembly and not an Estate of the Realm. They were, therefore, justly left to the

* Sir M. Hale, *Jurisd. of Lords' House*, 10; see also Hallam, *Middle Ages*, iii. 105, *note*; 187. Sir R. Twysden, *On the Government of England*, 128.

† Hallam, *Middle Ages*, iii. 132; Froude, *Hist. of Eng.*, v. 67.

consequences of their own choice. In the Irish Parliament, however, the representatives of the Clergy had continued to attend, although they maintained a separate existence. They claimed a right, not to vote in common with the other members of the House, but to concur with or dissent from the laity as if they formed a separate assembly. In the exercise of the right thus claimed they rejected a bill * introduced by the Government for the suppression of religious houses; and in consequence of this proceeding an Act of the Irish Parliament † was passed declaring such pretensions invalid. The preamble to that Act contains the assertion that the proctors never attended Parliament except as councillors or assistants "much like as the Convocation within the realm of England is commonly at every Parliament began and holden by the King's special license." This statement, which is certainly untrue, shows what little value such preambles are as evidence upon questions of legal antiquities.

§ 6. It is not difficult to understand both why the lower Clergy did not amalgamate with the other two representative bodies, and why they ceased to maintain a separate existence. Isolation from lay affairs and lay connections was the traditional policy of the Church. The self-sufficingness, which was necessary to the whole congregation of primitive Christians in the midst of a heathen population, still formed the precedent for the conduct of the Clergy of a Christian nation. The Church had its own laws, its own courts, its own system of administration. It drew to itself all business that it could describe as ecclesiastical. With this business it dealt in its own way; and neglected and despised the barbarous

Decadence of clerical legislation.

* Froude, *Hist. of Eng.*, iv. 74. † 28 Henry VIII. c. 12.

system of the Common Law. On the same principle the ecclesiastics kept aloof from all lay association in matters of legislation. They were not indeed concerned in much of the business that occupied the attention of the Knights or of the citizens. They were troubled neither with purveyors nor escheats; they had no direct interest in trade or in commerce. On the other hand they would have thought it treason to their order if they allowed any lay assembly to give advice on matters pertaining to Holy Church. They therefore had no inducement to join in the partnership which the Knights and the townsmen silently formed. They had, besides, meetings of their own. Each Archbishop convened by his own authority the Clergy of his province. The same persons who were elected to serve in Parliament would also be naturally elected for convocation. The representatives of the Church could discuss questions of ecclesiastical legislation, and if it were necessary could vote taxes, in their own assembly equally well as in Parliament. They therefore preferred the summons of the Archbishop to the writ of the King.

We find accordingly in the time of Edward the Second a declaration* from the Clergy that the Clergy of England had not been accustomed nor ought of right to be convoked by the King's authority. Although the Clergy on several subsequent occasions attended Parliament, it is probable that the King found it less troublesome and equally convenient to allow them to meet after their own fashion in Convocation. But in discontinuing their Parliamentary attendance the Clergy did not mean to abandon their right to advise the King upon subjects in which they were interested. "Whether in Convocation or in Parliament," says Mr. Hallam,† "they certainly formed a

* Hallam, *Middle Ages*, iii. 134.

† *Ib.*, 137; see also 1 *Lords' Report*, 332.

legislative council in ecclesiastical matters by the advice and consent of which alone, without that of the Commons, Edward the Third * and even Richard the Second enacted laws to bind the laity." We may trace in the time of Edward the Third both the separate action of the two bodies and the old jealousy of the laymen. The Commons beseech their Lord the King† that "no statute or ordinance be made at the petition of the Clergy unless by assent of your Commons, and that your Commons be not bound by any constitutions which they make for their own profit without the Commons' assent. For they will not be bound by any of your statutes or ordinances made without their assent." In that year two, and in the first year of the following reign three, statutes, if not more, were enacted by the King in his council at the request of the Clergy alone.‡ In the reign of Henry the Fourth there was a still more memorable instance of ecclesiastical legislation. There is little doubt that the terrible Statute of Heresy§ was obtained from the gratitude of Henry Bolingbroke and the zeal for the Church which characterized his House, at the exclusive instance of his Ecclesiastical Council of Advice. On the other hand we do not find any trace of the interference of the Clergy in the enactment of merely temporal laws. Mr. Hallam observes that only two instances of the kind are on record, one in the twenty-first of Richard the Second, annulling the proceedings of the Parliament in the eleventh year of that reign; the other when the Crown was entailed on the children of Henry the Fourth. But both these acts were, as Mr. Hallam remarks, unusual or questionable exertions of

* See also the *Articuli Cleri*, 9 Edw. II.; 1 *Lords' Report*, 276.

† 51 Edw. III. See Hallam, *Middle Ages*, iii. 136. 1 *Lords' Report*, 332.

‡ See Hallam, *Middle Ages*, iii. 136; 50 Edw. III. c. 4, 5; 1 Rich. II. c. 13, 14, 15.

§ 2 Henry IV. c. 15. See Hallam, *Middle Ages*, iii. 80. 1 *Lords'*, 137.

legislative authority, and may well have been supposed to require an unusual sanction. I may add that there is no reason to suppose that in these cases the action of the Clergy was other than concurrent, or that they in any way joined in the deliberations of the other branches of the Legislature.

§ 7. The process by which the two Houses of Parliament were formed out of the Great Council and the several representative councils of advice, although its results were complete, was slow. Traces of the old divisions lingered long in our history. The citizens and burgesses sometimes acted independently of the Knights. Either House sometimes taxed its own estate without the concurrence of the other House. The meetings of the Great Council, if not regular, were far from infrequent. Above all, the Clergy maintained their position as an independent legislative body to the time of the Reformation, and as the sole regulator of their own taxation to a still later period. The fusion of the Knights and the citizens and burghers was first accomplished. The formation indeed of the House of Commons in its present form was necessarily precedent to all questions of regularity. The difference of the tenths and the fifteenths still continued, but the tax was imposed by the composite body. The latest instance, so far as I know, of their independent action occurs in the year 1372. On that occasion, after the dismission of the Knights, the citizens and burgesses were ordered to remain, and were induced to continue for a year an aid granted in the former year of certain duties on wines and merchandise coming to the kingdom.* Even so late as the reign of Henry the

These political changes gradual.

* 1 *Lords' Report*, 329.

Eighth the distinction was observed, although the unity of the House was not impaired. On a motion for an increased supply * a doubt arose whether the yeas or noes had it, and the House divided, the citizens and burgesses by themselves, and the Knights on the other side. High words seem to have been used; and order was with some difficulty restored. Ultimately the grant was made, and the bill passed; but not before the King, as a remedy for such insubordination, had (if we may credit the tale) expressed his desire to behead a leading member of the Opposition.†

Neither House seems to have shown much concern as to the grants made by the other House, provided that such grants did not extend beyond the grantors themselves. In the year 1399 the Lords only were summoned for the express purpose of avoiding the necessity of charging the Commons; and they granted from their own resources an aid to the King. Subsequently we find the Lords promising to raise troops for the King, and on that account granting no money, while the Commons voted a subsidy.‡ In the year 1478 we have perhaps the latest instance of this separate action. The Commons on that occasion granted 14,000 archers for one year; and the Lords gave a tenth of their revenue. In a *Year Book* of that reign too it is said by the Court of King's Bench that a grant of money by the Commons would be binding without the assent of the Lords, meaning of course, as Mr. Hallam § observes, as to commoners alone. Even after our Parliamentary system had acquired considerable precision, the Great Council seems to have retained some portion of its original energy. There are recorded sixteen meetings of this body under Lancastrian Kings; and there

* Parry, 200.
† *Ib.*
‡ Cotton, *Abridg.*, 688.
§ *Const. Hist.*, iii. 28.

is reason to suppose that there were others of which all traces have been lost. We meet with allusions to such meetings in contemporary documents of Edward the Fourth. It is probable * that several of the so-called Parliaments of Henry the Seventh were in reality Great Councils. Such councils were usually held upon some important occasion on which, although some higher authority than that of the Privy Council was required, the convening of Parliament was inexpedient. Sometimes the business was too urgent to admit of delay: sometimes its nature was such that the opinion of Parliament was thought to be unnecessary. Sometimes such a meeting was intended to be preparatory to a Parliament. But as the authority of the Privy Council and of Parliament increased, no room was left in our constitutional system for this obsolescent assembly. Under Henry the Eighth and his children it fell into entire disuse. When Charles the First, on the invasion of the Scotch, attempted to revive it, its very memory had almost disappeared; and the only advice which the council when it met could tender to its Sovereign in his perplexity was, that he should forthwith dismiss it, and convene once more a Parliament.†

The separate authority of the clergy was the last relic of these medieval divisions. In the great ecclesiastical changes which took place in the time of Henry the Eighth the legislative power of Convocation was finally subordinated to that of Parliament. An Act of that reign ‡ in effect provides that no new canon should be made without the consent of the Crown; and that the canons then existing, so far as they are not inconsistent with the law of the land or the Royal prerogative, shall continue in force until revised by a Commission appointed for the purpose. No such

* See Mr. Spedding's note, *Bacon's Works*, vi. 247.

† Guizot, *Eng. Rev.*, 84. ‡ 25 Henry VIII. c. 19.

revision was made. The canon law, therefore, as it then existed and subject to the prescribed limitation,* has the force of an Act of Parliament and is withdrawn from ecclesiastical control. Attempts were made under James the First to bind the laity by mere ecclesiastical legislation, and to attach temporal penalties and disqualifications to excommunication. These proceedings, however, were vehemently resented by the House of Commons, and were contemptuously disregarded by the courts. Thus the legislative power of convocation scarcely equalled the ordinary power of a municipal corporation to make bye-laws limited to its own members exclusively and not inconsistent with the law of the land. But Convocation retained and exercised its original right of taxation. The supplies granted to the Crown by Parliament affected the laity alone, and separate grants were made on behalf of the Clergy by Convocation. Yet even these grants were confirmed by Act of Parliament. The first instance of such a grant entered on the Rolls of Parliament and stated in a statute appears to have been the grant of a Biennial Tenth in the year 1334.† After the time of Henry the Eighth such confirmation became regular.‡ The Legislature seems to have been unwilling to admit that in matters of property Convocation had authority to bind even the Clergy. At length in the year 1665 the Clergy were expressly charged with a tax then granted, to be levied not according to the old system of subsidies but by an assessment upon each county; and were discharged from the payment of the subsidies which Convocation had previously voted. This alteration, which is said to have been the result of a private arrangement between Archbishop Sheldon and Lord Clarendon, was

* See 1 Stephen, *Com.*, 64. † 1 *Lords' Report*, 317.
‡ Hallam, *Const. Hist.*, iii. 240.

probably introduced from the practical difficulty of ascertaining the proportion which the grant of the Clergy ought to bear to the whole in the new mode of assessment thus introduced. From that date this power of Convocation has never been exercised. Under our modern financial system the greater part of the public revenue is raised by indirect taxation, the incidence of which extends alike to clergy and to laity. No attempt therefore has been made by the Clergy to revive their power of imposing an additional direct tax upon themselves. Many High Churchmen have deplored this great blow to the independence of the Church. I am not, however, aware that the power of taxation has been absolutely taken away from Convocation. It was especially reserved in the Act of 1665 ; and I suppose that Convocation, if it thought fit, might still grant a supply to Her Majesty, just as the members for Liverpool or London might still claim their wages of two shillings a day for attendance in Parliament. Both these rights still survive, at least nominally and in contemplation of law, but merely as the relics of a state of society far different from our own.

CHAPTER XVI.

THE HOUSE OF LORDS.

The English Aristocracy.

§ 1. The history of the countries of Western Europe, except perhaps of Italy,* knows nothing of a time in which there were not nobles as well as freemen and serfs.† Homer sings of the Zeus-nourished Kings of Hellas, whose power was derived from and maintained by the gods. Tacitus describes in colder but equally distinct terms the similar sentiments of the primitive Germans. Both the Teutonic and the Scandinavian legends are full of the glories of the sons of Woden and of Thor. The more minutely, too, the institutions of these countries are examined, the more strongly do they confirm the teachings of history. Such an aristocracy, spontaneous in its origin and sentimental in its basis, was in full force among our Saxon ancestors. They drew a clear line of difference between the Eorl and the Ceorl, between the man of gentle birth and the simple but free-born churl. Every Saxon freeman was an owner of land; but the allotment of the aristocrat was larger than that of his humble neighbour, and the burthens upon it were less severe. The nobles prepared the business for the public meetings of freemen, directed its proceedings, and carried into execution its resolves. Like the Zeus-born kings that held council

* See Mommsen, *Hist. of Rome*, i. 77.

† Kemble, *Saxons in Eng.*, i. 123.

with the son of Atreus, the Eorls deliberated with Cerdic or with Ella; and all the people, whether Achæans or Saxons, on hearing the result of these councils shouted their approval. In that strange tariff, too, in which men's lives and limbs were so precisely assessed, and which supplied the surest test of rank, a wrong done to a noble brought with it a far heavier fine than a similar wrong done to a churl. A breach of the noble's mund, that is the protection that he guaranteed, was visited with a severer penalty than a similar breach in the case of ordinary freemen. And although the freeman was an elector, the noble was exclusively eligible for the offices of Priest or of Judge or of King.*

An aristocracy directly derived from this primitive form has always existed, and will probably continue long to exist, in England. The landed gentry are the legitimate descendents of the Eorl-cund men. Their distinctive legal rights have long since passed away. Our modern law, in theory at least, is no respecter of persons. It is with the one mouth that it addresses all men. It knows no difference between the transgression of the wealthiest county magnate and that of the humblest peasant on his estate. Neither the English law nor the English language is acquainted with such terms as *roturier* and *bourgeois*. But these privileges which the law withholds, the custom of the country and the habits of the people spontaneously offer. The influence of the large landed proprietors has been at all times very great. For many generations the county members, although considerably inferior in point of number to the citizens and burgesses, completely predominated in the House of Commons.† Even still, nothwithstanding the great changes which the industrial revolution of the last

* Kemble, *Saxons in Eng.*, I. 135. † See Guizot, *Rep. Govt.*, 423.

hundred years has wrought, the old county families retain their social position. There still may be found the untitled representatives of ancient houses to whom far more consideration is given by their neighbours than to the most successful millionaire or even to any recent Peer. But although the landed gentry form the central portion of a natural aristocracy, and are at the same time the connecting link between the class which is privileged by law and the main body of the nation, they are not those to whom the term aristocracy is in political writings usually applied. The British aristocracy is usually limited to the Peerage. That body alone possesses exclusive privileges which are known to the law; and it therefore alone, to whatever limits for social purposes our aristocracy may extend, can find a place in the law of Political Conditions.

§ 2. The House of Lords seems to be the result of two distinct principles. One of these is tenure; the other is official position. The Peerage of the present day is the descendent of the old Great Council of the King. But the Councillors of the King included in early times his principal tenants in chief. Hence, while the status of the Peerage is determined by its connection with the Crown, it still retains throughout all the changes of time many relics of tenure; and it still holds its place as the foremost part, though only a part, of the social aristocracy—of the Eorl-cund men, who were of gentle birth and were the owners of land.

Territorial origin of the Peerage.

I have already said that the Great Council which attended the King, whether in Saxon or in Norman times, and by whatever title it was described, was composed of the principal landholders of the country. After the complete establishment of the Feudal system a distinction seems to have grown up in the modes of habitual communication

between the Crown* and these landholders, now become its vassals. Those who held estates above a certain size, or the greater Barons as they were termed, corresponded directly with the King. Those whose holdings were less extensive, although they were still the King's Barons, corresponded with his officer, the Sheriff. Attendance upon the King's Court was a duty which their tenure imposed upon all Barons alike; but it is probable from the nature of the case that the smaller Barons gladly evaded an inconvenient and burdensome obligation. Their reluctance to attend would naturally be greatest, and their presence would be least required, when general questions of administration were under discussion, and when they had no direct pecuniary concern in the subject. The Great Council, so far as it was composed of vassals of the Crown, was thus gradually formed of the greater Barons alone. Custom and their superior wealth and social rank soon strengthened this exclusive right. The system of representation increased the difference between the two classes of Barons; and the distinction between the Council who deliberated on all questions and were summoned in their own right, and the Knights who appeared as the agents of the counties and dealt with special interests only, was fully established. When so marked a distinction in practice existed theoretically, equality could not last. The tenants *in capite* were all Peers. Whatever may have been the size of their estates, they all held by the same tenure and were subject to similar obligations. But when the political distinction between the two classes of military tenants was established, the title Peers was specialized. It was restricted to the members of the council. They were emphatically "the Peers." Between themselves there was equality, but they claimed to possess a higher rank than

* See above, page 420.

their fellow-vassals. In the same manner, too, they monopolized the common title of Baron. The *Barones Minores* were usually described as Knights. The words Peers and Barons describe the same class of persons from different points of view. The persons whom these terms denote were in relation to the King his Barons or men. In relation to each other they were Peers or fellow-tenants. The community of tenure was the fact which in feudal times established Peerage. The trial by Peers originally meant the trial according to customary and not Roman law by persons having the same status as the accused, attendant upon the same court, and usually resident in the same locality. The name was sometimes used metaphorically to express a relation analogous to that arising from a common tenure, such as the relation of the various classes that together formed the Parliament of the Crown. The "*Modus Tenendi Parliamentum*" speaks* of all the Peers of the realm, meaning by this expression the several estates that met in Parliament. The same work subsequently† enumerates the various degrees of Peerage in this sense, namely the higher and the lower clergy, the Earls and Barons, the Knights, the Citizens and Burgesses. At a later time the name acquired a special and limited meaning, and was restricted to a particular portion of the class which it originally described. Thus the history of the words Peer and Baron resembles that of *Manus* and of *Nexum* in Roman law,‡ or the history of a multitude of less remarkable words in our own and in every other language. Such words originally denote a single homogeneous class. When the process of differentiation has set in, this class is divided into distinct parts. Each part requires and obtains a

* Page 20. † Page 20.

‡ See Maine's *Ancient Law*, 316. See also, for specialization of words, Mill's *Logic*, ii. 232.

distinctive appellation: and the original name ceases to describe the class, which is no longer regarded under a common aspect, and is confined to some one of its newly established divisions.

Such a process as that I have attempted to describe was necessarily gradual. The distinction between the greater and the less Barons occurs in the preamble to the Statute of Marlbridge,* and again a few years later almost in the same words in that of the Statute of Gloucester.† In 1311‡ writs were directed *Majoribus Baronibus*. During this reign the first recorded instance of the title of Peers, as applied in its modern sense to the Earls and Barons, occurs in the year 1321 on the trial of the De Spencers.§ In the beginning of the reign of Edward the Third we read that the Lords in Parliament, when Sir Simon De Bereford was accused before them, protested that he was not their peer, and that they were not bound to try him. Yet this claim of Peerage might apparently be waived, for we find that Lord Berkeley, who was undoubtedly a Peer, put himself, when accused of charges similar to those made against De Bereford, upon a jury of twelve Knights of the county of Gloucester. This "remarkable anomaly," as Mr. Hallam calls it, ceases to appear such, when we observe that the status of a Peer of the Realm was at the time hardly settled; and that the jury consisted of those who were the peers of the accused in the old sense of the term "*Ses pers de la tenure meisme*." If the jury had been not Knights but burgesses, the anomaly would indeed have been remarkable. At length in the year 1341 an Act¶ was passed which fully confirmed and recognized the privileges of Peerage. It provides in effect that no Peer shall be compelled to answer or be judged except by his

* 52 Henry III. † 6 Edw. I. ‡ 1 *Lords' Report*, 277.
§ *Ib.*, 281. ‖ *Middle Ages*, iii. 122. ¶ 15 Edw. III. c. 2.

Peers, and that if any Peer choose to accept a different mode of trial the privileges of Peerage shall not be thereby prejudiced. This statute thus creates in favour of the old *Majores Barones* a distinct personal privilege. The privilege so enacted is personal and not merely official; it continues when there is no Parliament, as well as when one is in session; it extends to the wife and to the widow of a Peer; and it is lost to the widow when her relation to the deceased Peer is lost by a second marriage.* This Act doubtless merely confirmed and perhaps enlarged what had previously been the practice. Shortly after the statute of which this Act formed one of the chapters was passed, a writ directed to the Sheriffs was issued by the King in council, in which he declared that he had never really given to the statute his assent, but had acted with a politic dissimulation for the purpose of avoiding the inconveniences that might have attended his refusal, and that the statute therefore must be taken to be invalid and of no effect: "Willing, however, that the articles contained therein, which by other statutes of him or his progenitors, Kings of England, had been before approved, according to the form of such statutes should be in all things observed." This singular proclamation was confirmed by the following Parliament, so that it would at first seem that the Act to which I have referred is not in force. The statute is contained with the writ in the authorized collection of statutes and in all the printed collections; and its provisions have been in practice considered as law. It is probable therefore that the suggestion of the Lords' Committee† is correct, and that this Act must be deemed to be within the exception expressed in the writ.

Two other events of nearly the same period mark the

* 1 [illegible] K[illegible], 315. † *Ib.*, 316.

altered character of the House of Lords. In the ancient writ of summons the obligatory part ran in the words *in fide et homagio quibus nobis tenemini*. These words imply that tenure was the basis of the Lords' attendance in Parliament, or at least that those who were summoned had done homage to the King and consequently held of him. In 1371 this form, after some fluctuations, was finally changed ;* and the form now in use, in which the charge is *in fide et ligeantia*, upon allegiance and not upon homage, was adopted. Thus the Feudal Assembly based upon tenure was abandoned, and a council claiming the same style and the same powers, but no longer exclusively limited to the great tenants of the Crown, was recognized by law.

The other event to which I have referred belongs to the following reign, although the tendency which it marks was probably felt in the time of Edward the Third. At the commencement of representation it seems to have been understood that the Lords of Parliament answered for their tenants † and in their behalf consented to grants. Thus in 1340‡ the Prelates, Earls, and Barons for themselves and for all their tenants, and the Knights of counties for themselves and the Commons of the land, granted to the King the ninth sheaf, the ninth fleece, and the ninth lamb of all their sheaves, fleeces, and lambs for two years ; and the citizens and burgesses made a different grant. So complete was this representation, or rather this authority, of the Lords that grants of aid from their tenants were made to the King by separate Lords.§ The Knights of the Shires represented only the inferior tenants in chief, and not those persons who were personally summoned to

* Hallam, *Middle Ages*, iii. 123, *note*.

† 1 *Lords' Report*, 365. ‡ *Ib.*, 311.

§ See 1 *Parl. Writs*, 11, where the Archbishop grants a thirtieth of his tenants.

Parliament or the tenants of such persons. The tenants, therefore, of Lords Spiritual or Temporal were exempt from contribution to the wages of Knights of the Shire. But as the distinction between the hereditary and the representative parts of Parliament grew more marked, the distinction between the two classes of freeholders rapidly faded. The Knights elected at the County Court were soon regarded as representing all the men of the county; and the exemption of the Lords' tenants from the burthen of the wages of the Knights became a mere privilege founded upon a usage the original reason of which had ceased to exist. There was therefore no disposition to extend this privilege. The freeholders were naturally jealous of any reduction of the area of taxation. Every new acquisition of property by a Lord of Parliament withdrew some contributories, and so increased the burthen upon the rest of the community. It was accordingly enacted * in 1388 that the levying of the expenses of the Knights coming to the Parliaments for the Commons of the counties be made as had been used before that time; and that if any Lord or other man, spiritual or temporal, had purchased any lands or tenements or other possessions which used to be contributory to such expenses before the time of the said purchase, the said lands, tenements, and possessions, and the tenants of the same, should be contributory to the said expenses as they were wont to do before the purchase. This statute therefore marks a great change in the supposed character of the Lords Spiritual and Temporal. They must have been at that time considered as no longer the representatives of their own tenants, but as a separate and distinct branch of the Legislature having the peculiar character which they now sustain.†

* 12 Rich. II. c. 12. † 1 *Lords' Report*, 365.

§ 3. The derivation of the Peerage from the council of the King has led to several important consequences. It has determined both the mode in which Peerages are granted, and the functions which Peers exercise. Peers of the Realm enjoy rights and exercise functions in five distinct characters.* They possess individually titles of honour which give them rank and precedence. They are individually hereditary counsellors of the Crown. They are collectively (together with the Lords Spiritual) when not assembled in Parliament the permanent council of the Crown. They are collectively (together with the Lords Spiritual) when assembled in Parliament the highest court of judicature. Lastly, they are, conjointly with the Lords Spiritual and the Commons in Parliament assembled, the Legislative Assembly of the kingdom, by whose advice consent and authority, with the sanction of the Crown, all laws are made. With the exception of the first, all these characters belong to the Royal council. Even the personal rank and precedence might be supposed to be an incident of these relations to Royalty. But in all their other capacities the marks of the *Curia Regis* are plain. That body prior to its evolution dealt with all kinds of questions, legislative judicial and executive. In course of time separate but kindred organs arose for the discharge of these several functions. Still traces, though gradually becoming indistinct, of the old homogeneous form remain. The Lords are now a portion of the Common Council for legislation. They form the ultimate Court of Appeal. In affairs of state they may advise Her Majesty in the absence of Parliament; and each Peer† may separately tender his advice. Under our modern system of frequent Parliaments

Functions of the Peerage.

* 1 *Lords' Report*, 14. † See Massey's *Hist. Eng.*, iii. 225

and of Parliamentary government the two latter functions of the Peers may be said to have become obsolete. Their function of judicature is now performed by the Law Lords exclusively. The true function of the modern House of Lords is that of a Legislative Chamber. But the sole duty of a Peer, in whatever capacity he acts, is to advise the Crown. It is for this purpose and for none other that his order forms a distinct portion of the commonwealth.

§ 4. The prerogative of creating Peers seems to follow from this consultative character of the Peerage. The King is entitled to the counsel and assistance of every subject whose services he may require. So far has this principle been carried that it is doubtful whether the offer of a Peerage may be refused. The law indeed pointed out to the Crown its principal tenants as its constant, and as it were its natural advisers. But it at the same time left unrestrained the Royal discretion to obtain additional advice from any person who may seem capable of giving it. Accordingly, at a very early period, probably as early as Henry the Third,* three principles were established. The first was that no Peer could attend Parliament without a formal writ of summons. The second was that the King could not refuse such writ to any greater Baron or other Lord of Parliament. The third was that the King might summon to Parliament any person not being a greater Baron. Subsequently it was held that any person so summoned upon taking his seat acquired for himself and his lineal descendents the same rights as a greater Baron. There were thus in our earlier Constitution two modes of creating Peers, one by tenure, the other by writ. It followed from the nature of Peerage by tenure that the dignity ran

Peers: how created.

* See 12 *Reports*, 70; 1 *Lords' Report*, 483.

with the land; and that, if the land were by any means alienated, the title passed from the original possessor to the purchaser. I have said that, in times when land was hardly, if at all, regarded as an article of commerce, transfers of baronies were rare. But we find several cases in which the principle that the title went with the estate was recognized. In the reign of Henry the Sixth the House of Lords admitted the claim to the Earldom of Arundel as annexed to the castle honour and lordship of Arundel. In the same reign we find* the barony of Kingston Lisle bringing with it as of course a writ of summons. At length, in 1669, a claim to the title of Fitzwalter was argued before the King in council. Several eminent judges attended, and the nature of a barony by tenure was fully discussed. It was resolved that this form of Peerage "had been discontinued for many ages and was not in being, and so was not fit to be received or to admit any pretence of right to succession thereto." This decision, although not proceeding from the House of Lords, has been regarded as final,† and subsequent attempts to revive the ancient doctrine have been defeated. The case indeed is very similar to the recent decision against Life Peerages. In early times the writ of summons to Parliament may have been founded on tenure, and the Crown may have exercised the power of creating Peerages for life. In both cases, however, a contrary practice had prevailed for centuries; and a froward retention of customs in an altered state of society would, as Lord Bacon observes, have caused as much disturbance as a positive innovation. Neither Barony by tenure therefore nor Barony for life can be regarded as living parts of our existing Constitution.‡

I have said that the writ of summons was essential to

* Cruise, *On Dignities*, 42. † See Hallam, *Middle Ages*, iii. 239.
‡ Hallam, *Middle Ages*, iii. 239.

attendance in Parliament. This rule seems to have arisen from the power of the Crown to convene a Parliament when and where it thought fit. In such circumstances due notice to those concerned was absolutely necessary. But the objects of the meeting rendered the indiscriminate issue of writs not less indispensable. Since in early times these assemblies were usually held for the purpose of obtaining aids, the Barons were disposed to insist upon their right to be present, and to consent to the charge laid upon them. Accordingly we find the peremptory provision for summons in John's Charter. Again, in the reign of Henry the Third, the Lords refused to transact any business, because some members of their body had not been summoned, and were not present. From the forty-ninth of Henry the Third to the last year of Charles the First, Prynne* could find no unexplained precedent of the omission of writs of summons to any of the ancient nobility. In the reign of the latter King a remarkable case in point occurred. The King, dreading the disclosures which the Earl of Bristol was likely to make concerning the affair of the Spanish marriage, omitted to send that nobleman his writ of summons.† The House of Lords, upon the petition of the Earl, presented an address to the King praying for the issue of the writ. The King sent the writ; but accompanied it with a letter in which he declared that the former restrictions were to be continued, and positively forbade the Earl's personal attendance. The Earl laid the letter before the House of Lords; but the King anticipated further proceedings in his behalf by causing articles of charge to be exhibited against him. But there is no doubt that the King's constitutional will as expressed in the writ ought to outweigh His Majesty's private command,‡ and that the Earl might

* Quoted by Parry, *Parliaments, Introduction*, xxi. † *Ib.*, 306.
‡ Hallam, *Const. Hist.*, i. 379.

have taken his seat without paying any regard to the irregular prohibition conveyed through the Secretary of State.

The King is entitled to seek the advice of any of his subjects whom he thinks fit to consult. Accordingly from a very early period other persons besides the *Barones Majores* were invited to share in the deliberations of Parliament. Of these some, as we have already seen, were summoned as assistants. But in addition to these persons whose duty was merely to attend upon the House and give any information that might be required, other persons were summoned who had a decisive and not merely a deliberative voice.* There is, however, no reason to suppose that these councillors were at first other than occasional. The terms of the writ, so far from conveying any inheritable dignity, do not even imply that the services of the person to whom it is addressed will be required on any subsequent occasion. The practice of early times does not suggest any different inference. Prior to the accession of Henry the Seventh,† it appears that ninety-eight laymen were on one occasion only summoned to Parliament, and that fifty others were summoned twice, three, or four times. But although the effect of a writ of summons subsequently received a very different construction, the power of the Crown to issue such writs has always been acknowledged. Thus a personal nobility, deriving their dignity from their function, grew up by the side of the old territorial grandees. For the completion of the title to a dignity under a writ of summons it is essential that the person summoned should have actually sat by virtue of that summons in Parliament. If he failed to do so his right was merely inchoate, and was incapable of devolution.

* Hallam, *Middle Ages*, iii. 12. † *Ib.*, 125.

In the reign of Richard the Second we meet with the first instance of another mode of creating Peers, which has at length superseded the earlier methods. This method, which is the one now ordinarily used, is a grant by Letters Patent. It is probable that doubts had arisen respecting the hereditary character of the dignity by writ; and that it was thought expedient to remove these doubts by express words in the instrument by which the dignity was created. Besides, when the order of the Peerage was established, admission to it, partaking as it did of the nature both of real property and of an office, must have appeared to be a fit subject for a Royal grant. Whatever may have been the motives that led to its introduction, it does not seem at first to have been regarded with much favour.* It is doubtful whether Richard's grant had any effect. It was made at a time when his conduct was producing violent opposition; and the grantee (Lord Beauchamp) was in the following year impeached, not by his title of honour, but in his name (Sir John Holt) as a commoner. No further attempt of the kind is recorded for nearly half a century. But in the latter part of the reign of Henry the Sixth, and in the following reign, several cases of this description are found.†

A Peerage created by Letters Patent has two peculiarities. No formal act of taking the seat in Parliament was required; and so, if the new Peer died before he could take his seat, his Peerage, contrary to the rule in the case of the Peerage by writ, descended to his heir. On the other hand, as I have already observed, it was necessary that the patent should contain proper words of limitation. This method has long since become the most usual, because, as Lord Coke observes, it is the surest mode of conferring the

* Hallam, *Middle Ages*, iii. 130. † Nicolas, *Hist. Peerage*, 43.

dignity of a Peer. The method by writ, however, is still in use when the eldest son of a Peer is called during his father's lifetime to the House of Lords in the name of his father's barony.

§ 5. The Peerage long continued to exhibit indications of its territorial origin. Even at the present day we may notice in this part, as in so many other parts, of our Constitution the traces of antiquity. It was long a doubtful question whether the possession of the estate of a Peer did not bring with it the dignity of a Peer. Every new-created Peer must take his title from some place; and when Selden* wrote, the denominating territory was always some lordship or manor. But by far the most important mark of this influence is found in the hereditary character of the Peerage. This characteristic feature of our modern Peerage is not the creature of any positive law, but arose spontaneously from the nature of the case. The members of the Royal Council were the great landholders of the country. Their extensive estates were handed down from father to son undiminished and uninterrupted. This unbroken succession was due not merely to that pride of family that even still animates the English gentry, and induces them to regard alienation of their ancestral land with very different feelings from those with which they regard their personality; but, if an estate escaped forfeiture, it was not easy for it, while any heirs remained, to pass out of the family. Until the time of Henry the Eighth there was no means for devising real estate. Considerations both of public policy and of technical law were opposed to such a power.† Public men dreaded the undue influence of the Church over a dying landholder, and the ever-increasing

Transmission of Peerage.

* *Titles of Honour*, 282. † See 1 Spence, *Eq. Jur.*, 136.

extent of lands held in Mortmain. Lawyers would not hear of the transfer of seisin without actual livery, and livery a dead man could not give. Besides there was no court which could take cognizance of devises. The Temporal Courts could not deal with a will, and the Ecclesiastical Courts could not deal with a freehold. The alienation during his lifetime of a vassal's estate with the consent of his Lord was indeed permitted by law: and the Lord's consent could generally be obtained for a consideration. But to this proceeding there was a more formidable objection. There was no one to buy. There were no large capitalists who could purchase the whole estate of a greater Baron. Parcels of baronies may have changed hands; but the *caput baroniæ*,* the principal manor house, seems to have usually remained in the original family. Thus the estates of the greater Barons, as they were neither alienated during the life of the owner, and as their regular devolution could not be altered, passed from heir to heir. Each heir on succeeding to the estate had the same right to a place in the Great Council of the King as his ancestors enjoyed. This right was usually recognized. The Crown needed the services of the son as it had needed the services of the father. Thus the idea of hereditary descent became gradually associated with the status of a Peer.

So strong was this association that it extended to the new kind of nobility which arose not from the possession of land but from a personal participation in the Royal counsels. Some eminent persons who seem not to have held land baronies, such as the family of Scrope in the time of Edward the Third,† were constantly summoned from father to son, and thus became Lords of Parliament by a sort of prescriptive right. A precedent was thus set which might

* Hallam, *Middle Ages*, iii. 240. † *Ib.*, 127.

be enlarged into extending the same privileges to the descendents of all who had once been summoned. It was at length held, at what time it is difficult to say, but certainly in the time of Lord Coke,* that a writ of summons to Parliament and the sitting in Parliament in obedience thereto created without any words of limitation an estate of inheritance in the dignity. But although this was the prevailing opinion, and several cases were decided in which it seemed to be recognized, it was not finally established until the reign of Charles the Second. In the year 1673, in the case of the Barony of Clifton,† a decision of the House of Lords, after the opinions of the Judges had been taken, solemnly established the descendible nature of a dignity created by writ.

I have already observed that Letters Patent which grant a dignity must contain words of limitation. It is now settled that in the case of a Lord of Parliament the estate thus limited must be one of inheritance. In the case of Lord Wensleydale in 1856 the grant in the patent was for the term of his life.‡ But the House of Lords after full discussion resolved in effect that such a limitation was inconsistent with the fundamental character of the Peerage, and was insufficient to create the status of a Lord of Parliament.

§ 6. Although the King has thus the power of summoning at any time an unlimited number of persons to his High Court of Parliament, the hereditary character of the Peerage operates as a material check upon the needless exercise of this great prerogative. Some writers think that it was to restrict the power of the Crown by summoning occasional Peers, while

Independence of the Peerage.

* *Co. Lit.*, 16 *b.*; Cruise, *On Dignities*, 100.

† Nicolas, *Hist. Peerage*, 29. ‡ May, *Const. Hist.*, i. 248.

the hereditary character of the writ was still unsettled, that the system of creation by patent was introduced. It is certain that this limitation of the prerogative was the chief motive for the recent decision of the House of Lords against Life Peerages, although for such Peerages in strict law there was probably sufficient authority. With hereditary descent as an incident of the Peerage, the King feels that while his acts are in his own power their consequences are not. He may create a new Peer ; but that creation, when once it is made, extends to the most distant posterity of the grantee. No King could wish to make cheap those honours which are the ornament of his Court, and are prized in proportion to their rarity. But the creation of a Peerage by no means ensures to the Crown the permanent services of an additional supporter. It does not always follow that the new Peer himself will on all subjects continue friendly ; and there is no security whatever for the adhesion of his son or his grandson. The Crown therefore, although it theoretically possesses the dangerous power of selecting those advisers whose counsels are agreeable, finds it for its advantage to use this power very sparingly. The reception of the free opinion of the House of Lords, however unpalatable it may be, is obviously preferable to the destruction of the order.

There are other forms which show this constitutional jealousy of the Crown, and by which further provision is made for the independence of the House of Lords. Not only does a Peerage immediately become descendible to the heirs of the grantee ; but the grant cannot be revoked, nor can its effects be in any way diminished ; nor can it even be surrendered to the Crown ; nor does it admit of alienation. The latter restriction indeed must have been originally intended to secure the Crown rather than to restrict it, although even in this view its importance is

considerable. Its necessity arose from the conflict between the two fundamental principles of the Peerage. If a dignity were merely an incident of tenure, it must have been transferable with the estate to which it was annexed. If it were an office, the same considerations of public policy which prohibit the traffic in ordinary offices, would apply with still greater force to a seat in the highest council in the realm. In early times, accordingly, many instances occur of the alienation of dignities with the consent of the Crown. But as the number of Peerages by writ and patent increased, the inconveniences of this practice became conspicuous. At length in 1646, in the case of the Barony of Grey of Ruthyn,* the House of Lords unanimously resolved that no person that hath any honour in him or as Peer of the Realm may alien or transfer the honour to any other person. It is now well understood that dignities are absolutely inalienable. The same case of Grey of Ruthyn, and another case in the following reign, have settled that a Peerage cannot, even with the consent of its possessor, be surrendered to the Crown. The reason doubtless is both to render the check to which I have already referred more stringent upon the Crown, and to prevent the Crown from indirectly getting rid of the older and consequently more independent members of the House.

It needs hardly be added that the grant of a dignity, if even its voluntary surrender may not be accepted, cannot be revoked; nor can any grant inconsistent with the former grant be made to any other person. Attempts have sometimes been made† to give by Letters Patent to a new dignity a precedence beyond that which would arise from the date of the letters. Such precedence is now held to be illegal. It is the undoubted prerogative of the Crown

* Nicolas, *Hist. Peerage*, 44. † *Ib.*, 45.

to create any Peerage of any rank, or to raise any Peer to any higher degree of the Peerage to which it thinks proper; but it has not the power to give a precedence above any Peer previously created of the same degree.

I have already said that the Crown cannot in ordinary circumstances refuse to any Peer his writ of summons. It has however been held * that, if a Peer want possessions to maintain his estate, he cannot press the King in justice to grant him a writ to call him to the Parliament. But apart from such an accidental and partial suspension of his rights, a Peer who has not been attainted cannot lose his Peerage in any other manner than by an Act of Parliament.† One case only, that of Nevill, Duke of Bedford, in the reign of Edward the Fourth, is recorded in which a Peer was degraded by Parliament. The reason assigned for this measure was the Duke's want of means to support his dignity, and the many inconveniences to which such a position gave rise. But this, as Blackstone‡ observes, is "a singular instance which serves at the same time by having happened to show the power of Parliament, and by having happened but once to show how tender the Parliament hath been in exerting so high a power."

At the present time, therefore, as it has been for many generations, the Peerage is nominated by the Crown without any restriction as to number or time or rank or person. But the conditions under which nomination may be made are precise. The grant must be for an estate of inheritance, and cannot be revoked, or abridged, or surrendered, or transferred. Thus the independence of the Peers is secured by the same means as the independence of the judges, but in a still higher degree. The Crown has no power to silence

* 12 *Reports*, 107. † Cruise, *On Dignities*. 112.
‡ 3 Stephen, *Com.*, 11.

a refractory Peer. It cannot in any way affect the honours that he already possesses. In the great majority of cases there is not even the obligation which arises from the sense that the title was conferred by the King whose wishes are in question. Comparatively few of the Peers can derive their Peerages from the gift to themselves of the reigning Sovereign. Thus, although the grantee may be himself the servant of the Crown, he becomes both personally independent of the Royal control, and at the same time "the root of that hereditary principle which, uninfluenced either by the Crown or the people, was destined to support the rights of both, and form a barrier to withstand the encroachments of either."*

§ 7. The conjoint operation of both these principles, Barony by tenure and Barony regarded as an office, seems to have produced, or rather to have assisted in producing, the most characteristic feature of the British Peerage. Its privileges are strictly personal to its possessor. While in other countries every member of a noble family is ennobled, none but the head of the family for the time being enjoys with us any legal recognition. A barren precedency is all that the heir-apparent of the most ancient Earldom or the wealthiest Dukedom can claim. Until his ancestor's death he remains, and the younger members of his family always will remain, in the rank of Commoners. I may notice some early examples of this rule, although it must have previously been well understood. In the reign of Henry the Eighth the Earl of Surrey, eldest son of the Duke of Norfolk, was attainted of treason by a Common Jury, and not by Peers or Barons, because "he was in law as one of the meaner or

Privileges of Peerage personal.

* See Nicolas, *Hist. Peerage*, 42.

less nobility."* In the following reign it was resolved by the House of Commons, after a debate, that "Sir Francis Russell, being by the death of his elder brother heir-apparent to the Lord Russell,† shall still abide in the House as he was before." Some twenty-five years afterwards the Commons' journals record that the Lord Russell, son and heir to the Earl of Bedford, burgess for Bridport,‡ is ordered to continue a member of that House, notwithstanding the newly-acquired Earldom of his father.

The ground on which this doctrine rested may readily be conjectured. The Baron held undivided authority over the lands to which the barony was attached. He and he alone during his life had any control over these estates. In like manner he and he alone could exercise his office in the King's council. An office implies personal aptitude; and neither its duties nor its privileges could be extended to a crowd of sons or of more remote descendents. This hereditary office was therefore regarded as being in the nature of real estate. It went, as the family estate went, to the eldest son; and the younger children were entirely excluded. Nor could the eldest son during his father's life claim to share in the privileges of his father's dignity, any more than he could then claim to share in the administration and the enjoyment of his father's estate. These influences, however, cannot have been the causes of that *isonomia* for which England has been so often and so justly praised. They were coincident with the tendencies which produced that state, and must have strengthened their operation. But their actual effect was rather to prevent the growth of new inequalities than to correct the old. From the time of Henry the Third,§ if not from an earlier date, the legal equality of all freemen was in all essential

* Selden, *Titles of Honour*, 285. † Parry, *Parliaments*, 208. ‡ *Ib.*, 223.
§ See Hallam, *Middle Ages*, ii. 343.

points complete. The old Saxon distinctions had died out. The weregild no longer marked and perpetuated the division of classes. All offences had become violations of the King's peace. The nobility and the middle classes followed the same business, embraced the same professions, and even intermarried with each other.* In such circumstances there was no longer any room for the difference between the Eorl and the Ceorl. But there might have arisen a body with new and more formidable privileges. The great nobles who formed the council of the King might have claimed much larger immunities, and might have given a much wider extension to the privileges of their order. That they did not do either of these things is owing partly to the general feeling of justice which seems to belong to the national character, and partly to those peculiar influences that I have attempted to indicate. Yet there seems to have been even at an early period a tendency in the English towards the limitation of nobility to its actual possessor. Among the Anglo-Saxons† the Athelings included only the sons of a King, or in default of sons the relations next entitled to the succession. With them, as with our own nobility, the third generation ceased to show by any external signs its noble descent.

* See De Tocqueville, *France before the Revolution*, 151.

† Lappenberg, *Anglo-Saxons*, ii. 308.

CHAPTER XVII.

POLITICAL REPRESENTATION.

Representation: why unknown in antiquity.

§ 1. One of the principal difficulties in historical study is the necessity of dealing with social and political questions that arise out of circumstances essentially different from those with which we are familiar. We have not only the painful effort of endeavouring, often with very imperfect materials, to shadow to ourselves some form of the society whose history we are studying, but also the still more arduous task of guarding against the extension of our own modes of thought and our own associations to remote times and unlike institutions. Not the least important example of this historical difficulty is found in the different objects to which in ancient and in modern times the sentiment of patriotism has been attached. We of the nineteenth century are familiar with large political aggregations, with extensive territories and millions of men forming an organized polity, with each distinct centre of population having its own life and yet contributing to compose the national life, and with numerous and efficient securities for good government and for the proper control within its due limits of the Executive. It requires, therefore, a strong mental effort both to free ourselves from the misleading analogies of our own day, and to transport ourselves to a time when each borough or township was an independent sovereign state. Yet such

was the general habit and feeling of the ancient world. In every part of Southern Europe, in Italy, in Sicily, in Spain, in Gaul, and above all in Greece, the self-governing town was the true political unit. In the writings of all the great thinkers of antiquity, the idea of the autonomous city is accepted as the indispensable basis of political speculation.* In their mind and in their language the city and the state were one and the same. The city must indeed be of a certain size. A mere village was unable to supply those arrangements for the proper conduct of public business which the higher class of minds in those times regarded as essential. No organization less than the city could satisfy the wants of an intelligent freeman. But no other organization could include the city. The city was itself a perfect and self-sufficing whole, and did not admit of incorporation into any higher political unity.

In those small states where the feelings for the corporation and for the country were so strangely blended, the sentiment of loyalty, or rather of devotion to the city, was developed in a very high degree. The state was not regarded as composed of the sum of its members and existing for them. It was held to have a separate and a higher existence. Aristotle observes † that the city precedes the individual as the whole precedes the part. All the rights that any Athenian or Roman enjoyed were his, not from any personal claim, but because he was a citizen of Athens or of Rome. It was, therefore, at once the highest privilege and the most urgent duty of each citizen to serve the state in his own person, whether at home or in the field. He was bound to accept any office that the state might place in his hands. He was bound to assist his fellow-citizens in enacting the laws by which the city

* Grote, *Hist. of Greece*, ii. 302 ; *Ib.*, 348. † *Politics*, B. i. c. 2.

should be governed, and in selecting the officers by whom her peace should be preserved and her honour defended. Thus grew up the feeling that political rights must be exercised in person, and in the General Assembly of the Citizens. No delegation was admissible ; and in no other place and under no other conditions than in the Ecclesia or the Comitia duly convened in the customary meeting-place of the city could these duties be performed. If a citizen left his native city, he ceased to retain his full civic rights. The Hellenic emigrant lost all legal connection with the parent state, and became an additional unit in the Hellenic aggregate. Only the moral tie which bound him to his metropolis was stronger than that which bound him to any other kindred city. The Roman colonist was sent forth on a special service, and so retained his old allegiance. But he, too, lost the rights he could no longer exercise ; the new community was not part of Rome, because it was the son and subject of Rome. In certain circumstances the colonist was permitted to return, and then he resumed his former position.* So, too, if a Roman citizen were taken in war, his status was suspended ; but if he escaped or were released and returned, the suspension was removed, and he resumed, though not always as of course, his former rights.

Perhaps the most decisive proof that we possess of this cardinal doctrine of antiquity, namely, that a free constitution is inseparable from the appearance of the sovereign people in person in their collective assemblies, is found in the relation of the Italian states with each other and with Rome. When in the course of the social war the Italian states had resolved to destroy Rome, or at all events to secede from it, and to found a new state, they could devise

* See Smith's *Dictionary of Antiquities*, *Title Postliminium*.

no other polity than that which had been traditionary among them from time immemorial. When they might have established the constitution of a state, they merely founded the organization of a town. The Urbs Italia was to supersede the Urbs Roma. "It is significant," says Dr. Mommsen,* "that in this case, when the sudden amalgamation of a number of isolated cantons into a new political unity might have so naturally suggested the idea of a representative constitution in its modern sense, no trace of any such idea occurs; in fact, the very opposite course was followed, and the communal organization was simply reproduced in a far more absurd manner than before." Subsequently, when Rome had triumphed, but had yielded after the war all the political privileges that before the war she had refused, her own condition was such as both to suggest and urgently to require some form of representation for her more remote citizens. The burghers now no longer lived in the city or in its immediate vicinity. The people of Quirinus, if it did not yet include all the inhabitants of the Peninsula, comprised all the dwellers between the Rubicon and the Sicilian Straits. It was absurd to suppose that this population could habitually meet for the transaction of business in the Roman Forum. Yet the votes of the Italian free-holders might on many an occasion have counteracted the venal voices of the "Turba Remi." To none, however, of the statesmen of the day, neither to the philosophic Cicero, nor to the great and liberal Julius, nor to his nephew, skilful though he was in public organization, did the simple expedient of representation present itself. Augustus alone seems to have made some partial attempt to establish local polling places,† where the votes might

* *Hist. of Rome*, iii. 239. † Merivale, *Hist. of the Romans*, iii. 499.

be taken and transmitted to Rome. Even this project seems to have been either unsuccessful, or to have become, as the Imperial Government grew stronger, unnecessary. When the Empire was hastening to its fall, the Emperors attempted to check the speed of its dissolution by a sort of Confederation of the Provinces. A rescript was issued by Honorius and Valentinian,* establishing for the Gallic Provinces at Arles in the South of France a yearly meeting of public functionaries, proprietors of domains, and judges of provinces or their deputies. Even in this proceeding we cannot, I think, trace any approach to representation. At most, some kind of federation would have been formed of which the Government would have consisted of the officials of each separate state. The project, however, entirely failed. "The Roman world had returned to its first condition; towns had constituted it; it dissolved, and towns remained."†

It was not only that by the custom and the religious sentiments of the city state the citizen's personal service in public affairs was necessary. Even in the business of private life, agency, as we understand the term, was unknown. A contract with an agent could be effected only by a trust, of which for a long time the state took no notice. A contract by an agent could seldom be effected at all. This condition of the law arose from the structure of archaic society. Each archaic household was distinct, complete, and self-sufficing. It contained many members, under a directing chief or Pater; and all acquisitions by its several members were made not for their own use but for the corporation. Further, as the household was supposed to consist not of living members only, but also of the spirits of their male ancestors, the

* Guizot, *Civ. in Europe*, i. 30. † *Ib.*, 33.

services of strangers were thought to be unacceptable to those invisible guardians of the household's fortunes. Hence arose the twofold rule of Roman law which declared* that acquisitions might be made for a House Father by those who were in his *manus*, and might not be so made by any free person outside that description. It was but slowly and sparingly that this rule was relaxed. First, in proceedings before a *Judex*, a representative *(cognitor)* was allowed. When Roman commerce was extended, and when Roman business houses were established beyond Italy, the shipmaster and the manager were permitted to bind their respective principals. Then, by way of analogy, this limited right was extended to a few other cases. Beyond this point† the Roman law of contract does not seem to have gone. Even if, as some writers have contended, a true system of agency were established in the later Roman law, this result was not obtained until many centuries after the maturity of its constitutional organization. It is not, then, a matter of surprise that when the doctrine of agency was unfamiliar, if not unknown, in the simpler cases of private business, it should not have been practised in the more complex affairs of political life.

§ 2. The idea of political representation is thus of comparatively recent date. It is, in fact, both much more recent and much less general than we might at first be inclined to suppose. In England, where its development has been most complete, it dates from about the middle of the thirteenth century. In Spain its date was about a century earlier. In other parts of Europe it commenced at a somewhat later period. Nowhere, however, has it been carried out with such

Representation: why used in England.

* Just. *Inst. II.*, ix. Pr. and 5. † Mr. Hunter's *Roman Law*, 441.

success as among the Anglican race. It is, therefore, a question of no common interest to inquire into the circumstances which led to the use of a political instrument so powerful in its results, so obvious (as it now seems to us) in its application, and yet for so many centuries unknown to the ablest thinkers and the most skilful statesmen. For the discovery of any such political expedient two conditions at least are essential. The want which it is designed to satisfy must be keenly felt. The existing state of political knowledge and sentiment must be such as to suggest, or at least must not be inconsistent with, the means for satisfying this want. In England these conditions concurred. It was the acknowledged right of the vassals of the Crown to determine both the expedience and the amount of the extraordinary assistance which the Crown might require for the exigencies of the state. It was their acknowledged duty to attend for the render of suits and services at the Royal Court. The inconvenience of assembling in one spot at one time so large a body as the whole of the tenants *in capite* was obvious. Such attendance must have been burdensome to all ; but to the smaller tenants it must have been peculiarly oppressive. It was, especially while the Normans and the English were not yet amalgamated, dangerous to leave the country districts without their proper defenders. The privilege which these military tenants assumed of appearing under arms did not tend to render these assemblies more desirable. If the tenures were subdivided, and the numbers of those who ought to be summoned increased, these difficulties were proportionately augmented ; and unless those who obeyed the Royal summons could bind those who neglected to attend, the powers of the Assembly must have been very defective. But while the attendance of all the tenants of the Crown was thus inconvenient, their

absence was equally objectionable. Not merely was their consent in some form required, but the King, finding his greater Barons difficult to manage, seems to have contemplated * the erection of a counteracting force in his council. If he had failed with his more powerful tenants, he might, perhaps, have better success with his Knights. Such seems to have been the policy of John,† and such was the course that, throughout the whole of his long reign, his son unsuccessfully pursued.

There are several circumstances which in the reign of Henry the Third at least tended to prepare the public mind for the principle of political representation. At all times some kind of delegation had been customary. All those suitors who petitioned the King and his Great Council for the redress of their several grievances attended on the meeting of that body to make known their wants to the Fountain of Justice. When counties cities and towns desired to make in their corporate capacity any such application, they must from the very nature of the case have sent delegates to present their petitions ‡ or to prefer their complaints. The system of Ecclesiastical Councils rested, as Mr. Hallam § observes, on a virtual or an express representation, and may have had some tendency to render the application of the principle of national assemblies more familiar. At different times, too, we read of Knights being chosen, apparently as a sort of jurors, either to give information on certain local matters which the King desired to know or to assess subsidies. But whatever weight we may attach to these considerations as facilitating the introduction of representation, the immediate origin of that system seems to me to be due to a different cause. It commenced not as representation, but as agency. It

* Guizot, *Rep. Gouv.*, 354. † 1 *Lords' Report*, 61.
‡ 1 Spence, *Eq. Jur.*, 266. § *Middle Ages*, iii. 11. ‖ *Ib.*, 12.

related not to the exercise of political functions, but to the payment of private money. Attendance upon the King's Court was always burdensome. It was an obligation imposed upon the tenants of the Crown which they were required to fulfil, not a privilege which they were eager to enjoy. Under the earlier Plantagenet kings, as the render of suit and service became less important, the object of these assemblies was merely financial. It was not, as we have seen, until a later period that these financial assemblies acquired political functions. It was not, therefore, in the light of a delegation of strictly personal rights that political representation first presented itself to our forefathers. Whatever might have been the usage as to such affairs, there was no doubt that for money matters, for the transaction of ordinary business, the appointment of an agent was both convenient and customary. If a military tenant were unable to appear when the Royal standard was unfurled, he might find if he could a substitute. Those ecclesiastics who held lay fiefs were from the nature of the case obliged habitually to render a substituted service. The Statute of Merton* expressly provides that every man who owes suit at the County Court or other local court may freely make his attorney to do those suits for him. The persons † who were summoned to attend at the meetings of the Great Council, and who could not personally be present, were usually allowed to appear by their attorney or proxies. In such circumstances the election of a few persons to act as proxies for all the military tenants of a district was inevitable. It resulted from that tendency in human nature by which men are led to reduce to the lowest possible quantity the effort that the attainment of their object demands. Representation arose

* 20 Henry III. c. 10. † 1 *Lords' Report*, 127.

in the same manner and for the same reason as the class of factors or of carriers is developed amongst ourselves. Between these two cases, however, there was a fundamental difference. While the varied occupations that are due to modern industry grew and expanded without any material interference from the state, the agency of the Crown tenants was soon regarded as a public duty. The King was eager to receive persons fully authorized to grant him the money he required. The constituent bodies were glad to have their business transacted on moderate terms. It was, therefore, quickly established that a representative, when once chosen, was bound to serve. It was not competent for him either to decline or to neglect the task. He was, indeed, entitled to a fixed compensation; but, subject to that compensation, a Knight could no more refuse to give his services to his country than his descendent can now refuse to give his land, if it be required under a Railway Act.

It was thus, I think, that the representation of the counties and that of the inferior clergy commenced in England. The extension of the principle to the towns was an easy matter. The tallages on towns were usually levied on them collectively, and not upon the individual citizens. The tendency of early times to extend the principle of corporate bodies was strongly marked, and towns were always regarded as separate existences. It was also easier for the Royal officers to deal with the civic officials, and leave them to reimburse themselves as best they might, than to collect a hated tax from a poor population. Thus, both from their own customs and from the convenience of the King, each town was regarded as a corporate community. But there is no other way by which, either in law or in fact, a corporation can appear, except by its attorney or agent. When, therefore, the communities of the shires

were required to appear by their authorized agents, the same rule was naturally extended, when their presence was required, to the communities of the towns. This view is consistent with the language of the early writs. In the writ of 1254 the Knights are to come "in the stead of each and all." In the great writ of 1295, and in the subsequent writs of the same reign, the Knights are to have "full and sufficient power for themselves and the community of the aforesaid county to do what shall then be ordained of common council in the premises." The same direction is given in respect of the citizens and burgesses. The same words are used in writs sent in 1302 to the Cinque Ports and to Yarmouth. Between these places various disputes had arisen, and both bodies were required to send three or four representatives to the Court of Parliament, "to learn the King's pleasure in this matter, and further to do and receive what of our council we have thought fit to ordain."* In this case the agency is clear; the purpose only is different from the preceding case.

History of representation of counties.

§ 3. No shock, therefore, was given to any received opinions or prejudices by the appearance of our earliest representatives. They were merely agents with general powers, but sent for a special purpose, and, at least in the case of the military tenants and the parochial Clergy, acting from motives of convenience each for a great number of principals. With this view the early history of our representation entirely corresponds. The dream of Saxon Parliaments elected by universal suffrage has long passed away. Neither Saxons nor Normans knew the name or the substance either of Parliament or of the suffrage. Even in the Great Charter

* 1 *Lords' Report*, 469.

itself there is no allusion to representation in any form. On the contrary, that instrument provides for the personal attendance of all the inferior military tenants under the writ of summons to the sheriff. It has been justly observed that the absence in such an instrument of any reference to any representative body, whether for legislative purposes or for the granting of aids, is strong evidence against the existence of such a body at that time. It was not until forty years after the meeting at Runingmede that, in a writ, the form* of which confirms the supposition that no representative body had any previous existence, the first recorded instance of county representation is found. In the year 1254, Henry the Third, in contemplation of a campaign in Gascony, and in addition to other preparations, commands each of the sheriffs to send to his council two good and discreet Knights of his county, whom the men of the county shall have chosen for this purpose in the stead of all and each of them, to consider along with the Knights of other counties what aid they will grant the King in such an emergency. In the following year occurs the first unequivocal instance† of the representation of the lower Clergy. The object of this case was the same as that which led to the representation of the Knights. The King required the money of the Clergy, but dared not take it without their consent.

Although the germ of representation is thus visible, its political uses were still undeveloped. The object of these meetings was purely financial; and their finance was seigneurial, not national. A Parliament in the modern sense of the term was as little known to Henry as to John. Notwithstanding these precedents of representation, neither the King nor the discontented Barons nor the

* *Lords' Report*, 95. † Hallam, *Middle Ages*, iii. 131.

loyal Barons seem to have thought of consulting these representative bodies in their subsequent disputes. Neither in the submission of the differences between the King and the Barons to the decision of the King of France in 1263, nor in the award upon that submission, nor in the subsequent negotiations before the contending parties appealed from that award to the final arbitrement of the sword, is there any mention of any general Legislative Assembly or any suggestion as to the opinion of any such body upon the condition of the kingdom.* A free Parliament as a means of remedying public grievances was an idea of much later date.

History of representation of Clergy.

§ 4. I have said that the Bishops and the mitred Abbots held their lands by the ordinary lay tenures. Such was not the case with the inferior Clergy and many religious houses. Even at the present day† the parochial Clergy and many religious and eleemosynary foundations hold their land in frankalmoigne. That tenure was, as we have seen, not subject to any pecuniary claim either for commutation of service or for any aid. For the most part, although not always, the terrors of sacrilege sufficiently protected the Clergy from Royal exactions. At length, when Jerusalem had fallen before the victorious arms of Saladin, and the loss of the Holy Land was imminent, the Kings of France and of England, with the consent of their Great Councils of Prelates and Barons, imposed upon all their Clergy towards the expense of a new Crusade a general tax of one-tenth of all their movable property. This tribute‡ was the foundation of all the taxes upon ecclesiastical benefices, whether for the benefit of the Crown or of the Holy See.

* 1 *Lords' Report*, 137. † 1 Stephen, *Com.*, 213.

‡ Gibbon, vii. 267 (Dr. Smith's edition).

During the reign of Henry the Third, the Pope,* partly it would seem as head of the Church and partly as the acknowledged Lord Paramount of England, both himself frequently and heavily taxed the English Clergy and permitted the King to levy similar contributions. The King, however, was reluctant to enforce his claims against men who were protected both by the ordinary rights of freemen and by the sanctity of their order. An expedient, therefore, was devised for obtaining their consent and for settling the amount of the gift. In the year after the first recorded instance of County Representation we meet for the first time † with the representation of the Clergy. In both cases the business was the same. That business was the grant of an aid to the King, who was seriously embarrassed by his acceptance from the Pope of the Sicilian Crown for his son Edmund, and by his attempt to reduce this gift into possession. Various meetings of the Clergy are subsequently recorded. In the year 1282, the abbots, priors, and proctors of deans and chapters refuse an aid because the Diocesan Clergy were not summoned *more debito.* ‡ In 1294 the representatives of the Clergy were summoned to meet the King at Westminster. In the following year the "Premunientes" clause was inserted in the Parliamentary writs. This clause was not, however, uniformly inserted until 1354. When the Clergy were not concerned in the subject matter of discussion their presence seems not to have been required.

I have already traced the political history of the estate of the Clergy. I may, however, notice in this place two points in which the representation of this estate illustrates the general theory of polical representation. The first point is that both in its structure and in its functions

* Milman, *Hist. of Lat. Chris.*, iv. 96, 307.
† Hallam, *Middle Ages*, iii. 131. ‡ Parry, 51.

the Ecclesiastical Assembly was strictly analogous to lay assemblies. The representatives of the Clergy, like the representatives of the Knights and the representatives of the towns, were summoned for the purpose of contribution. It was not until a subsequent period that they acquired the power of legislation in ecclesiastical affairs. Hence, as the House of Commons differs from the Assemblage of Estates in the continental kingdoms, so does the Convocation of the English provinces differ from the Ecclesiastical Councils in other Christian countries.* In those countries where legislation was the primary object, these councils were exclusively composed of Bishops and other dignitaries of the Church. In England, where the primary object was the taxation of the ecclesiastical order, those persons whose interests were affected as contributories to the tax were required to attend, either personally or by their proctors. The second point to which I referred is that the name proctor, by which the representatives of the Clergy are to this day designated, sufficiently attests the opinion of contemporaries as to the original character of the office. These persons were merely the agents of their class, appointed to transact certain pecuniary business in which both they themselves and their principals were concerned. The existence of the agency may have led to the growth of the political function; but the political function did not lead to the use of the agency.

History of representation of towns.

§ 5. It is now settled † that the origin of the representation of cities and boroughs does not ascend beyond the forty-ninth year of Henry the Third. On the 12th December, 1264, under the administration of Simon De Montfort, Earl of Leicester, writs

* 2 Stephen, *Com.*, 541. † Hallam, *Middle Ages*, iii. 27.

were issued, not only to the Sheriffs, but also to the citizens of York and of Lincoln, and the other boroughs of England, to send two of their more discreet and worthy citizens or burgesses, and to the Barons and good men of the Cinque Ports to send four of the more lawful and discreet men, "*Nobiscum cum Prelatis et Magnatibus regni tractaturi et auxilium impensuri.*" These writs present two peculiarities. First, they are directed to the towns direct, and not to the Sheriffs; secondly, a letter is written (*scribitur*) to the towns; but a command is issued (*mandatum est*) to the Sheriffs and the Cinque Ports. These are those famous writs which have preserved the name of De Montfort long after his exploits, his success, and his fate have ceased to interest. But although it is certain that our representative system was not complete before the year 1264, it is by no means equally certain that its completion was then attained. This innovation of De Montfort has received more attention from modern inquirers than it deserved. It was not the actual commencement of representation, for the representation both of the counties and of the Clergy preceded by several years that of the cities and boroughs. It did not solve the real difficulty in representation. Towns have necessarily more or less of a corporate character, and therefore must always have employed some species of agency. When an organ of expression was once found for a multitude of unincorporated and independent Knights, there was little merit in the extension of the principle to towns. Much less can the precedent of 1264 be regarded as the commencement of what we now understand as the House of Commons. That event, as we have seen, belongs to a period at least one hundred years later than the administration of De Montfort. Nor did his contemporaries regard Leicester's writs as involving any serious political change, or even as

establishing any notable precedent. We know literally nothing of the Earl's policy or of its results. We cannot tell why he excluded London or why he included the Cinque Ports. But the succeeding Parliament disavowed all his proceedings. None of the contemporary writers, even of those most devoted to his cause, notice the peculiarity of his writs.* Few of them even mention the Parliament for which these writs were issued. Nor does the precedent appear to have been speedily or closely followed. Although there seem to have been assemblies during the intervening period, and although these were probably of a representative character, the next well-marked instance of representation occurs eighteen years afterwards. The partial issue of writs was abandoned ; and the writs were directed not to separate towns, but on a fixed principle to each Sheriff for every town within his bailiwick.

It is, however, far more important to ascertain the character in which the representatives of the cities and boroughs appeared and the purposes of their coming than to fix the exact time of their first election. I have already said that the citizens and burgesses represented tenants in ancient demesne ; and that the object of their attendance was partly to assess the rate of tallage which they were required to pay, and partly to give to the King and his council information and advice upon questions either affecting their interests or coming within the sphere of their occupations. Many considerations support this view. Tenure is a *vera causa*. It was at that time in operation. It was sufficient, if it were applicable, to have produced such an assembly as that of the citizens and burgesses ; and it is not unreasonable to suppose that the success of the representative system in cases where the right to refuse

* 1 *Lords' Report*, 151.

contribution was admitted might lead to its extension to those cases where not the duty to contribute but the amount of the contribution was in dispute. Apart, however, from any question of antecedent probability, there is positive evidence of several kinds. In the reign of Edward the First the towns and ancient demesnes are taxed conjointly, and their grants are separate from the grants of the counties. The amounts granted by the towns and demesnes are always greater than those granted by the counties, a circumstance which harmonizes with the known fact that tallages or the compulsory payments by the demesne men were heavier than the aids or voluntary donations of the freeholders, but which it is otherwise difficult to explain. In the eleventh year of Edward the First the City of Chester sent representatives. On no subsequent occasion was Chester summoned until by an Act of Parliament in the reign of Henry the Eighth provision was made for the representation of both the county and the city. But at that particular time the King had in his own hands the Earldom of Chester, and Chester held of the Earl.* In the twenty-sixth year of the same reign Northallerton returned members to Parliament. It belonged to the Bishop of Durham, but was then in the hands of the King, who had seized the Bishop's temporalities in Yorkshire.† Subsequently, when the Clergy of the Province of York made their peace with the King, Northallerton was restored to the Bishop; and never afterwards sent representatives, until in 1640 the House of Commons revived its right and the rights of many other boroughs. In the sister kingdom of Scotland none but Royal burghs—that is, boroughs which held of the King—ever sent members to the Scottish Parliament. Finally,

* 1 *Parl. Hist.* 189. † *Ib.*, 381.

Littleton* connects the boroughs which send members to Parliament with ancient boroughs in which burgage tenure existed. So far as these boroughs held of the King they were ancient demesne ; so far as they held of some other Lord, Littleton's words may mean a Royal borough granted to some other Lord, but still retaining, as we have before seen, its obligation in tallages to the Crown.

Although the tenancy in ancient demesne was thus the origin of the representation of towns, that representation soon lost its original character. The towns were soon regarded rather as the trading or mercantile interest than as a peculiar part of the territorial interest. The first indication of this change appears in the separation of the other tenants in ancient demesne from the towns. In the fifteenth year of Edward the Second, the Prelates, Earls, Barons, Knights, and communities of the counties granted to the King a tenth, and in the ancient demesnes of the Crown a sixth. At the same time the citizens and burgesses granted a sixth. Thus while the distinction as to the rate was observed, the grant of the country tenants in ancient demesne was no longer determined by those of the same tenure as themselves, but by the military tenants of the Crown. For what reason this change was introduced, or on what principle the military tenants

* Secs. 162-4.—"Tenure in burgage is where an ancient borough is of which the King is Lord ; and they that have tenements within the borough hold of the King their tenements, that every tenant for his tenement ought to pay to the King a certain rent by year, &c. And such tenure is but tenure in socage. And the same manner is where another Lord spiritual or temporal is Lord of such a borough, and the tenants of the tenements in such a borough hold of their Lord, to pay each of them yearly an annual rent. . . . And it is to wit, that the ancient towns called boroughs be the most ancient towns that be within England : for the towns that now be cities or counties in old times were boroughs, and called boroughs ; for of such old towns called boroughs come the burgesses of the Parliament to the Parliament, when the King hath summoned his Parliament."

assumed to tax those whom they did not represent, there are now no means of determining. Perhaps it may have been that the towns were then regarded as having an interest apart from that of mere tenure ; and that the old rule of tallage by the advice of the King's Council, as in the Parliament of Merton, was adopted in reference to those parts of the demesnes which were not represented. Such an arrangement may have been considered beneficial to the demesne men, because they had not the expense of sending representatives, and were only charged, as before, at the same time and the same rate as the towns. A further reason may be that the Lords answered for their bondmen or copyholders, and in their grants expressly included these persons. Hence, prior to 1832, copyholders never voted for Knights of the shire or contributed towards their expenses. It may therefore have been thought that no peculiar representation was needed for the corresponding class of Royal tenants ; and the origin of the town representation may have been overlooked in the admitted fact of its existence and of the practical difference between the burghers and the other men of the demesnes.

This theory, while it is consistent with such evidence as the records afford, explains some questions which, without its help, cannot readily be answered. We can, by its help, understand why a mere general direction was given to the Sheriff to summon all cities and boroughs in his bailiwick. He was officially concerned in receiving the rent or other charges of these towns. He alone, therefore, could accurately know, and he was bound to know, what towns held of the King or were, at the date of the writ, in the King's hands. From all such towns it was his duty to require representatives to be sent. No further direction was therefore needed, or would have been proper. We may thus, too, explain much of the strange irregularity of representation

in the reign of Edward the First. Many places which even then were insignificant sent representatives to the Parliaments of that King.* Many places which even then were of considerable importance are never mentioned as Parliamentary boroughs. Nor were the same places always represented. Much blame has been attributed in this matter to the Sheriffs ; and in later times, when a seat in Parliament was more eagerly desired than it was in the reign of Edward the First, such censure may not have been undeserved. But it is hard to trace any motive for such misconduct in the thirteenth century. A simpler explanation is found in our ignorance of the facts of each case. The first class of anomalies may have arisen from the represented towns being Royal boroughs, while the others were not. The inconsistency in the return may have been caused—and in some cases, such as Chester and Northallerton, we know that it was so caused—by the borough happening to be at one time in the hands of the King, while at another time it was not.

This connection of representation with tenure also explains the later rise of borough representation, as compared with that of the counties. On other principles such a sequence would seem altogether improbable. To a town—especially an incorporated town—some form of representation is essential. Such an artificial person cannot appear otherwise than by deputy. But the military tenants of the Crown, whether small or great, acted and were required to act each in his personal right. There would be no difficulty in understanding the extension to these separate freeholders of a system of agency which the practice of the towns would naturally suggest. But it is not easy to see why representation commenced in a class

* 1 *Lords' Report*, 375.

where there was no particular reason to expect its presence, while it was yet absent in the class in which its existence would have been natural. In Castile, the representatives of towns appear nearly a century before their appearance in England. The necessity of establishing frontier posts against the constant hostilities of the Moors* induced the Spanish Kings to encourage municipal institutions, to make to the towns large territorial grants on condition of military service, and to seek in council their assistance and advice. Yet although the practice of representation thus existed, its principle was never applied to the other classes of the kingdom.† Representation was a necessary incident to the presence of the towns, but it was not then regarded as a political contrivance. In England, however, there was nothing to require the Parliamentary attendance of the towns. Their assistance in legislation was not wanted. Their concurrence in taxation was not necessary. The King, therefore, had no motive to summon them to his Parliament. He could accomplish all that he desired without them; and they would have regarded the necessity of sending deputies as a gratuitous and unreasonable burthen. It was not until the King had discovered by experience the advantage of the representative Assembly of Knights, that a similar system was extended, both for purposes of advice and for the assessment of contributions, to those tenants of whom the citizens and burgesses were the most important.

It has been urged‡ in favour of what has been with an unhappy equivoque called the "liberal view" that several towns which belonged not to the Crown but to private

* Buckle, *Hist. Civ.*, ii. 135; Hallam, *Middle Ages*, ii. 6, 19.

† *Middle Ages*, ii. 24.

‡ Bishop Stubbs's *Const. Hist.*, ii. 232; Mr. Cox's *Ancient Parliamentary Elections*, 150.

lords, sent representatives to the Parliaments of Edward the First, and especially to that of 1295. The fact is true, but it does not support the desired conclusion. My contention is, not that the towns that sent representatives were necessarily of Ancient Demesne, but that at the time of election they were, whether originally or by some later title, in the hands of the King. There were many other titles to towns besides that of demesne. They came into the King's hands by exchange or purchase, or by escheat or forfeiture or wardship. The right to tallage was sometimes reserved by the original grant. The King's towns were thus fluctuating and not a constant quantity. Hence, as I have said, the writs were addressed to the Sheriff, because he was bound to know with what towns in his bailiwick he had pecuniary dealings. It follows, then, that for the purpose of disproving the theory of tenure it is not enough to show that certain towns which sent burgesses to Edward the First's Parliaments belonged ordinarily to private lords. It ought to be further shown that at that particular time these towns were not in the King's possession, or were not subject to his right of tallage. Two events in the reign of Edward will account for most of the so-called private towns. Many towns in Cornwall and Devonshire belonged to the Earl of Cornwall ; but that earldom became extinct in the latter part of Edward's reign, and the towns consequently reverted to the Crown. Again, out of the thirteen cases of this class cited by the Bishop of Chester nine are towns that belonged to bishoprics and abbeys. But in his great contest with the Clergy Edward seized into his own hands their lands, and so these towns became during this sequestration Royal towns, and consequently sent members to Parliament. I cannot, therefore, agree with the learned Bishop of Chester that "the evidence of fact seems decisive in favour of the more liberal interpretation."

§ 6. There is nothing in the early history of Parliament more striking than the silence of all contemporary writers respecting the commencement of representation. Of the nature of the change which was thus effected in the middle of the thirteenth century, of the new political principle thus established and its momentous consequences, none of the men who witnessed it seem to have had any conception. Although since the time of Henry the Second every occurrence, however trifling, which affected the proprietary rights of the Crown has been recorded in the Exchequer Rolls, and although since the time of John every Chancery record has been carefully enrolled, there is no trace of any original writ of summons to Parliament according to the provisions of *Magna Charta*. Our knowledge of that assembly in which the representatives of the counties first appear rests merely on the writ. It did not attract the attention of a single chronicler. Our knowledge of the first representation of the Clergy is derived from an incidental notice in the annals of Burton alone. Even the famous writ of De Montfort is left to tell its own tale.* Some of the annalists, although they are minute in their description of both the preceding and the subsequent events and are favourable to the Earl of Leicester, make no mention whatever of this Parliament. Others merely notice the fact that such an assembly was held, and do not betray the slightest sign of consciousness that it was in any way remarkable. The great reforms of Edward the First derive no light from the comments or the explanations of contemporaries.† It was with this, as it has been with almost every other great improvement in human affairs. The time of the fusion of the Saxons and the Normans is uncertain. No historians

Importance of representation not at first perceived.

* Parry, 45. † See 1 *Lords' Report*, 205.

have troubled themselves to record the gradual decay of villenage. We have already seen with how little of outward show our ministerial system came into existence. Contemporary observers were not concerned to notice* the abolition of the censorship of the Press, or the commencement of modern journalism. Horace Walpole, though a professed man of letters, does not even mention† the establishment of the British Museum. "They show," observes Sir Walter Scott,‡ writing of Lord Orford's "History of His Own Times," and Sir George Mackenzie's "Memoirs," "how little those who live in public business and of course in constant agitation and intrigue knew about the real and deep progress of opinions and events. They put me somewhat in mind of a miller, who is so busy with the clatter of his own wheels, grindstones, and machinery, and so much employed in regulating his own artificial milldam, that he is incapable of noticing the gradual course of the river from which he derives his little stream, until it comes down in such force as to carry his whole manufactory away before it."

§ 7. Whatever may have been its early history, there is no room for doubt as to the present function of the representative body. That body is the legal organ for the expression of the popular will. As the Royal will is intimated through the various channels and in the various modes prescribed by law, so a specific method is provided for making known to the King in a distinct and authentic form the opinions and the wishes of the various classes of his subjects. "The virtue, spirit, and essence of a House of Commons consists

Representative body the legal organ for expressing popular will.

* Macaulay, *Hist. of Eng.*, iv. 542, 601.

† Earl Stanhope, *Hist. of Eng.*, ii. 29.

‡ Lockhart, *Life of Scott*, vii. 12.

in its being the express image of the feelings of the nation."* It is in this sense, as the same great authority observes, in its quick and unfailing sympathy with the national sentiment, and not from its popular origin, that that House is truly representative. Whether the prevailing sentiments of the people be right or wrong, they ought to be made known to the Crown ; and the utterance of the House of Commons is that expression of popular feeling which and which only the Crown is bound to receive. "His Majesty," says Burke,† "may receive the opinions and wishes of individuals under their signatures and of bodies corporate under seals as expressing their own particular sense, and he may grant such redress as the legal powers of the Crown enable the Crown to afford. This and the other House of Parliament may also receive the wishes of such corporations and individuals by petition. The collective sense of his people His Majesty is to receive from his Commons in Parliament assembled."

This view is supported by the language of the old writs. The House of Commons is not a voluntary assembly of persons desirous to express their opinions on public affairs ; but is summoned by the Royal writ to assist with its advice and support the Crown in the high concerns of the realm. The writs of summons expressly require that the representatives of each constituency should have full power for themselves and their constituents to do and consent to what shall have been ordained as the result of their common deliberation. The powers of a body so summoned and so authorized must from the very nature of the case be exclusive. The King might or might not accept the advice for which he had thus asked, or might have recourse to other advisers ; but if he wished to have the public opinion

* Burke's *Works*, iii. 146. † *Ib.*, 520.

of his realm, there was but one source from which that aggregate opinion could lawfully be collected. The same consequence follows from the very style and character of the Lower House. That body is not the House of Representatives but the House of Commons. The Commons of England are themselves in contemplation of law present in Parliament by their duly appointed agents. It is the Commons of England that grant to their King the needful supplies. It is the Commons of England that form one Estate of the Realm.* It is the Commons of England that advise and consent to the enactment of laws, and that are entitled to present themselves before Her Majesty and to address her upon every subject of public interest. The individual members of the House of Commons have no such powers. They are not an Estate of the Realm ; but, in the language of the old statutes, are come for such an estate. They are avowedly agents, and act only in their principal's name. But they are agents with full powers. The sentiments, therefore, which they express are the sentiments of their principals ; and it is not competent for those principals, while the relation continues, either to disavow those sentiments or to seek other organs of expression.

It is, indeed, sometimes found that an existing House of Commons does not adequately express the views of its constituents. It has also happened that the constituent bodies do not adequately express the feelings of the nation. The former case is a mere temporary inconvenience arising from a personal unfitness ; and a prompt and sure remedy can easily be applied. The other case, although a much more serious functional derangement, can also when it unfortunately occurs be successfully treated. But the

* See Hallam, *Middle Ages*, iii. 104.

proposition that the sense of the nation must be sought in the House of Commons seems never to have been formally denied. Our history, therefore, in assuming this doctrine affords little means for its illustration. Some occasional indications, however, may be noted of a desire on the part of the Crown to escape from the necessity of recognizing the utterances of the House of Commons as conclusive evidence of the national voice. Charles the First sought to find a substitute for Parliament when he revived at York, in 1640, the long disused Great Council of Barons; but his attempt only served more conclusively to establish the rule. In the following year the same unhappy King seems to have formed an analogous design. He denied not so much that the voice of the House of Commons was the voice of the nation, as that the voice of the majority was the voice of the House. He hoped by the aid of the Lords and of a minority of the Commons to reverse the legislation of the preceding year.* It was their knowledge of this project that exasperated the leaders of the Opposition, and that gave its fierceness to that famous dispute as to the right of members of the House of Commons to protest, of which an eye-witness has left so vivid a description.† As the result of that dispute, it was then settled‡ that no such right exists. The voice of the people of England is but one voice; and, when it is uttered, it must give forth no uncertain sound. In the following reign, when the House of Commons and the Crown were at variance on the subject of the Exclusion Bill, the utmost efforts were made to procure loyal addresses. The country was canvassed in every direction to obtain petitions hostile to the House of Commons; and the Judges of Assize§ were diligently employed in lecturing the grand

* Forster, *Hist. Essays*, i. 110.
† *Ib.*, 112.
‡ *Ib.*, 170.
§ Hallam, *Const. Hist.*, ii. 439.

juries on the principles of Toryism. Again, in 1784, when many addresses had been presented to the King sympathizing with him in his struggle with the House of Commons and his dismissed ministers, George the Third assigned as a reason for refusing to comply with the desire of that House that he should displace Mr. Pitt "that numbers of his subjects had expressed their satisfaction at the change he had made in his councils." This preference of *ex parte* addresses to the legitimate organ of public opinion was at the time severely criticised; and it is to it that reference is made in the passage which I have before cited from Mr. Burke's famous Representation, moved as an amendment to the Address on the opening of the new Parliament.

Although English precedents on this subject are scarce, there are some American decisions in which the principle we are considering is prominent. In several states of the Union attempts have from time to time been made by the Legislature to transfer the burthen of deciding some particular question to the whole male population. But the courts have always held that such proceedings are invalid. Under the Constitution both of the United States and of each separate state, the majority indeed governs, but only in the prescribed form. Accordingly when such Acts are brought before the courts whose duty it is to administer not only them but the written Constitution to which they ought to conform, the courts have invariably decided that these Acts are, either wholly or certainly to the extent in which they direct an erroneous performance of legislative duties, void. Thus, in Pennsylvania* the court held that a statute authorizing the citizens of certain counties to decide by ballot whether the sale of spirituous liquors

* 1 Kent's *Commentaries*, 501, *note*.

should be continued in these counties was unconstitutional, as being a delegation of legislative power not permitted by the Constitution and contrary to the theory of the Government. So, too, when in the state of New York* an Act to establish free schools was by its terms directed to be submitted to the electors of the state, to become law only in the case of a majority of votes being given in its favour, it was held that the whole proceeding was entirely void. "The Legislature," said the Court of Appeals, "had no power to make such submission, nor had the people the power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the Constitution. The government of this state is democratic, but it is a representative democracy; and in passing general laws the people act only through their representatives in the Legislature." These cases, therefore, show† that, even in a country in which popular rights are not viewed with disfavour, the only voice of the people to which the law will listen is that voice which is uttered in accordance with law; and that, although the laws are the people's laws, the people must obey them while they continue, and cannot change them except in the manner in which these laws provide.

§ 8. It has been sometimes supposed that representation is due to the physical impossibility of collecting at the same time and in the same place all the inhabitants of a great country. It is assumed that if it were possible for the people to act in their primary capacity they both would so act and ought to do so. Since, however, the requisite conditions of such action

Representation a substantive institution.

* [illegible], *Stat. and Con. L.*, 165.

† But see, on delegated legislation under English law, the author's *Legal Duties and Rights*, 49.

cannot be obtained, the next best course is representation. Thus the city governments of antiquity would at least in this respect be the type of political perfection. In comparison with them our modern system would on these principles be merely a substitute, although a good and useful substitute, for the natural and complete expression of the popular will. But there is a radical difference between the old market democracy and the representative democracy of the present day. Representation is not a makeshift: it is a substantive institution.* It is essentially distinct from the government of the Agora or the Forum; and as a political instrument is far superior to that polity. If indeed the primary action of the people were desired, that action could, as the actual practice of both France and America shows, be easily obtained. Nothing more recondite is wanted than some proper arrangements for polling. Our law, however, as I have attempted to prove, distinctly recognizes the original and independent character of representation. The general conviction, too, of its practical superiority is shown by the deliberate adoption of representation in those cases in which, such as our municipal organization and our great commercial companies, the system of the market government might easily be obtained.

There are in the representative system many incidental advantages to which this preference of it is in some degree due. But the primary principle on which its value rests is the same principle which regulates the exercise of the Royal will. The people require checks and limitations and enlightenment no less than the King. An aggregate assemblage of individuals must be restrained and informed no less than each individual unit of that aggregate. If a

* See Lieber *On Civil Liberty*, 134; Mommsen, *Hist. of Rome*, iii. 98.

monarchic absolutism be liable to infirmities, democratic absolutism is liable to other and not less dangerous infirmities. For the Sovereign Many therefore, as well as for the Sovereign One, the law assigns a specific and exclusive form of expression. The object of this form is the same in both cases. It is designed to secure the well weighed and deliberate opinion of the utterer. We have already seen the various methods by which the will of Royalty is communicated. For popular utterances a suitable organ is found by the aid of the principle of trusteeship. The application of this principle produces several important results. By its means the size of the deliberative body is reduced to reasonable limits. An orderly and comparatively unexcited assembly is substituted for the tumultuous crowds of the market. The selection, too, of a few persons to act upon behalf of many others never fails, even in circumstances of great excitement, to produce a sobering effect. The responsibility is in such circumstances less divided, and is consequently more acutely felt. The representative feels, too, that a reason will be required for whatever course he adopts, and that he must give his reason, subject to criticism. Both in their acts and in their forbearances, therefore, a representative assembly is more careful than a larger and less responsible body would be. Nor is it the least merit of representation that the representative is generally above the average of his constituents. From the very nature of the case he is selected on account of some superior aptitude, real or supposed. Thus, although the representative reflects and ought to reflect the character of the electors, he reflects that character in its more favourable and not in its less favourable aspects.

CHAPTER XVIII.

THE HOUSE OF COMMONS.

Meaning of Commons' House.

§ 1. A political writer of the time of Henry the Eighth records his opinion that "*Plebs* in Latin is in English commonalty, and that *Plebeii* be commoners." * This opinion has still many adherents. The marked distinction that has always been maintained between our two legislative chambers, the aristocratic character of the one and the popular origin of the other, and perhaps, too, the proud humility of conscious power in the lower House, have attached to the term Commons in political language its secondary to the exclusion of its primary meaning. The House of Commons means to most minds the House of the Common People. It contains, as they think, the representatives of "those English churls" † whom they proudly contrast with their Norman lords. Yet this was certainly not the original meaning of that honoured name. Whatever might have been the case in the time of the Tudors, the Commoners of the earlier Plantagenets were not and were not supposed to be Plebeians. There was a fundamental difference between the Plebeian of early Rome, an alien in his native town, and the lawful and discreet men that

* Sir T. Elyot, *On Government*, b. i. c. 1.

† Mr. Maurice, *The Workmen and the Franchise*, 44.

attended the councils of the first Edward. Still less resemblance exists between the degenerate rabble that disgraced the later Roman Commonwealth and the belted Knights and prosperous burgesses that were included in the Commons of England. In the earlier period of our history the "folk" or people, taken collectively and not with reference to the class to which they respectively belonged, never seem to have been called "common" in any invidious sense. The term Commons meant all those who enjoyed common rights and were subject to common duties. Thus the Commons' House of Parliament means the House not of the Common people but of the Communities.

On this point the language of the old records is distinct. In these venerable documents the word "*communitas*" is of constant occurrence, and relates to a great variety of subjects. The "*Modus tenendi Parliamentum*" speaks of the "*Communitas Parliamenti*" in the sense of all the estates of the realm or the collective Legislature. In the same work the "*Communitas regni*" means the nation generally. In the writs and other documents of Henry the Third and of Edward the First,* "*Communitas regni*" and "*Communitas terræ*" mean the military tenants of the Crown. The same expressions are also used with the same meaning in the public documents of Scotland.† So, too, we find an address to Edward the First ‡ during his father's lifetime from the "*Communitas Bachelariæ Angliæ*," that is apparently from the Knights or *Barones Minores*. We read, too, of the community of the Prelates and Barons, so that the Lords were in one sense described as Commoners, just as the Commoners are styled in the *Modus tenendi* Peers of Parliament.§ Thus the word *Communitas* implies an assemblage of peers, or persons of the same

* 1 *Lords' Report*, 135, 171, 277.
† Brady, *Glossary*, 98.
‡ 1 *Ib.*, 171, 247.
§ Parry, 43, *note*.

tenure, and having consequently common rights and duties; and the generality of the expression must be qualified accordingly by reference to the subject matter. A curious illustration of this view occurs in the translation of the writs* summoning the Parliament at Oxford, in 1258. In these writs, which were issued both in the French and the English language, the words "*le Commun de nostre Reaume*" in the one are rendered in the other by "the landsfolk of our kingdom." The summons, therefore, did not apply to all the people or the humbler class of people, but to those who were directly connected with the land. Again, each county is described as a community, and frequent reference is made to the community of the counties collectively. Each city and each borough was in like manner a community; and when they are represented in Parliament, the collective assemblage is described as "the communities of the cities and towns." When, therefore, the communities of the counties coalesced with the communities of the cities and of the boroughs, the assembly thus formed contained all the communities and none but the communities of England. Accordingly the Knights, citizens, and burgesses, each class representing a separate class of communities, are described† collectively as having come for the whole community of the realm. As distinguished from the Assembly of Lords summoned separately each in his own right, the representative body was strictly the House of the Communes, or the Commons' House of Parliament.

§ 2. This subject does not concern the etymologist only, or the antiquarian. It involves matters of grave political interest. The name, the Commons' House or the House

* 1 *Lords' Report*, 110, 127. † 50 Edw. III.

of the Communes, indicates the fundamental principle of our representative system. It points to the Commune, to the political body, and not to the individuals of whom that body is composed, as the object of representation. The basis of English representation has never been personal, but always organic. The electoral franchise has never been in England regarded as a purely personal right, and has never been exercised upon exclusively personal qualifications. Our electors have always voted, not because they were men or even because they were Englishmen; but because they were freeholders of a particular county, or because they were citizens or burgesses of a particular city or town. Their right is circumscribed by locality. We do not elect our representatives as the Athenians elected their Archons, as the French elected their Emperor, and as the Americans elect their President. We do not take the vote of every elector, irrespective of all other electors, for all the members of the House of Commons. According to the method which has at all times been in use with us, each locality undertakes the duty of furnishing to the representative branch of the Legislature a specified number of members. Thus our system of representation is the representation not of interests or of opinions, or of population, but of population organized. Hitherto that organization has had chiefly, although not exclusively, a territorial form. In other words, our representative system has been mainly the representation of districts. It regards men not merely as men, but as neighbours. In one sense it is obviously true that a district cannot have other rights than those of the people who inhabit it. But the rights of a district are those of its organized population. Its inhabitants by virtue of their residence have, as compared with the inhabitants of other places, separate habits and

Representation of communities.

interests and associations, peculiar views on public affairs, and peculiar sympathies and modes of thought. These distinctive habits and feelings produce a distinctive character. The individuality, the independent life, of each political body, is established ; and it acquires and desires to express its special shade of feeling and of thought.

A district, then, is something different from a mere polling division. Its electoral uses are the consequence, not the cause, of its existence. It is not, like a polling place, formed to be a part of the machinery of election ; but it is fitted to perform electoral functions by reason of its previous organization. An electoral division, on the contrary, such as most reformers contemplate, has a purely artificial character. It does not contemplate any other use than those for which it has been specially established. It has no existence prior to those uses or apart from them. In determining, therefore, the area of an electoral district, it does not fully satisfy the principles of our Constitution to collect together from any quarter the required amount of electors. Such a course recognizes one element only of a district, and excludes a second and not less important element. It takes into account population, but not neighbourhood. If a town be too small to have a political individuality, if it be not a πόλις, but only a κώμη, it ought not to have any special representation, and should merge into the surrounding county. If its size be sufficient to admit of representation, it ought to have its own peculiar political organ, and its individuality should not be lost by an intermixture with other distinct bodies. Districts, since they are determined by a natural, and not by an arbitrary division, will, like all other natural objects, vary, although within certain limits, in size. This natural inequality cannot be remedied either by the arbitrary subdivision of a populous district or by the consolidation of several districts

in which the population is small. Such divisions or amalgamations may sometimes be convenient for polling purposes, but they do not affect the community of feeling and of interest which our ancestors required as characteristic of a district.

§ 3. Another principle hardly inferior in importance to that of the representation of localities may also be traced to the very origin of our Parliamentary history. The writs have always required the election of Knights for each specific county, and of citizens and burgesses for each specific city or town. But, in addition to this requirement, all the electoral districts were originally regarded as equal. The total number of members, indeed, frequently varied. The earlier Plantagenets exercised a large and absolute power not only over the towns entitled to representation, but over the number and the qualifications of the representatives.* They sometimes commanded the presence of four, but generally of two Knights. Sometimes the writs directed that the same Knights, citizens, and burgesses should be a second time returned, and that new elections should be held in those cases only where members had died or become incapacitated. At other times a moiety of the old members were summoned to correct the imperfections of the work done by the whole body. In 1352† one Knight only from each county and one citizen and burgess from each city and town were required to attend for that turn, "that we may withdraw as few men as possible from their autumnal occupation." On that occasion London and the Cinque Ports sent two citizens and Barons, which appears to have been half their usual number. Sometimes the city of London and the Cinque Ports were

Equal representation of electorates.

* Parry, xxi. † *Ib.*, 123.

commanded to return two citizens ; sometimes the number was increased to four. Sometimes two Barons were held to be sufficient for all the ports. Sometimes two citizens and burgesses, and sometimes one only, were ordered to attend for each city or town. Again, an option* is given of sending sometimes two or three members and sometimes three or four. But in all this diversity the relative equality of the several constituencies was maintained. The number of members which each constituency returned might vary in separate Parliaments ; but in the same Parliament all were treated alike. No one district enjoyed a greater privilege or bore a heavier burthen than the rest.

There is little room for doubt as to the cause of these differences. The presence of a greater or less number of members cannot have been of any practical importance. At the time at which votes were separately counted, the usage as to numbers was complete. But in earlier times it seems to have been long unsettled whether votes should be taken *per capita* or *per stirpes*, whether each representative was entitled to give his separate voice, or whether the several representatives of a constituency were required to concur in a single expression of opinion. So late as the time of Henry the Fourth, the King granted† special leave of absence to Admiral Clyderowe, one of the members for Kent ; and the other member, Robert Clifford, was at the same time authorized to act as if both were present. If this usage prevailed, it would of course still more strongly illustrate the principle of equality. It would also explain the apparent anomalies in the representation of the Cinque Ports and of London, an anomaly which in the latter case has continued to the present day. It would explain, too, the origin of that principle of inequality which

* Parry, 54.

† 3 *Rolls of Parl.*, 572 *a*.

we meet at the end of the first Edward's reign. In a writ of the last year of that King the Sheriffs are commanded in the usual way to send two Knights, two citizens, and two burgesses, or only one, as the borough may be larger or smaller.* This deviation from equality was probably due to considerations of economy. The object was to reduce the burthen upon the smaller towns, not to give to the larger any exclusive privilege. Thus, to the Parliament of 1403 Norwich was required to send four burgesses. This enlargement of their franchise seemed to the burgesses so alarming† that they paid £3 to John de Alderford to get the matter altered. Similar considerations of expense sometimes led to the total extinction of political rights. The borough of Chard, for example, sent burgesses to Parliament for the first thirty years of the fourteenth century; and then finally ceased to exercise the right on the avowed plea of inability to meet the expenses. The distinction thus established became permanent. Until the present century, although many new constituencies were added in England and the unions with Scotland and Ireland had been accomplished, the proportion between the various electoral bodies remained as it had been settled at the end of the reign of Edward the First. Each county until the increase in the representation of Yorkshire on the disfranchisement of Grampound, and except London each city, sent respectively their two members. Of the boroughs some sent two members, others only one. No unreformed constituency except the two already mentioned had more than two representatives, none could have less than one.

§ 4. I have already observed that the Anglican polity is representative, and not, in the classical sense of the term,

* Parry, 67. † Roberts, *Southern Counties*, 469.

democratic. But this distinction does not express the full force of national representation. That system is distinguished not only from the democracy of the market place, but from delegation. In almost all the mediæval kingdoms of northern origin the government by assembled estates prevailed ; but the members of these estates, when they did not appear in their own right, were deputies or attorneys sent with specific powers to remedy specific grievances.* In England alone the Knights and townsmen, who came from their respective counties and towns, were not delegates, but were true representatives. They were general agents, and were not limited by any specific instructions. They were not mere messengers to present the petitions of their constituents ; but their presence was required both to aid in forming a national policy, and to assent to it when it was formed. The office, therefore, of a member of the House of Commons implies something more than even a general agency for a particular district. Such a member is empowered, indeed, to speak and to act for himself and for his constituents. But his powers do not stop there. He is a member of the Supreme Council of the Crown. He is bound to give the King true and faithful advice to the best of his judgment, not upon the matters which affect his own constituents merely, but on all questions which concern the King, his estate, and the defence of the realm and the Church of England. Thus, although he has been selected by the electors, or a portion of the electors of a particular district, he represents not merely those who voted for him, or even the inhabitants of his district, but the whole kingdom.† Each constituency in effect undertakes the care of providing a specified number of persons for the Royal council and of superintending

National representation.

* Lieber, *Civil Liberty*, 133. † 4 *Inst.*, 14.

the course of their public conduct.* Thus, an aggregate body of efficient statesmen is obtained, a salutary control is exercised over their proceedings, and a convenient means is secured of bringing before the Legislature, as occasion may arise, the wishes and the wrongs of the several districts. "Parliament," said Mr. Burke to his constituents, "is not a Congress of Ambassadors from different and hostile interests, which interests each must maintain as an agent and advocate against other agents and advocates; but Parliament is a deliberative assembly of our nation with one interest, that of the whole, where not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole. You choose a member, indeed, but when you have chosen him he is not a member of Bristol, but he is a member of Parliament."

These views of the great political philosopher are fully supported by the language of our ancient writs, and by our early constitutional usage. The early writs require the election of the more discreet, or more worthy, or more able persons; or by some similar expression they indicate that the person sent will be required to exercise his discretion. They expressly enjoin that the persons sent shall have full power, both for themselves and for their community, to treat with the King and the magnates, or to do and to consent to what shall then and there be ordained of common council. In those early political assemblies which preceded the formation of the House of Commons, the vote of each assembly, or of the majority of it, was binding upon the entire class to which it belonged. The Charter of John expressly provides that the business of assessing aids and scutages is to proceed, although all those who

* See *Rationale of Political Representation*, 138.

have been summoned may not be present. The grants, whether of Lords, or of Knights, or of Clergy, or of citizens and burgesses, or of the Barons of the Cinque Ports, except when the city of London is treated as a separate power in the state, were always made not for a particular person, or diocese, or county or town, but for the whole community of the particular class. When, therefore, the various lay communities coalesced the united body acquired the aggregate powers of its component parts ; and as each member was not only entitled, but required, to vote upon each question, so the decision of the United Assembly was binding upon each and all the communes of the kingdom. They came, as they said to Edward the Third, for the whole community of the realm. Accordingly we find, in a petition of the Commons on the subject of wages of members, in the third year of Henry the Fifth, a distinct assertion that the Knights were elected by, and represented as well those within the franchises as those within the rest of the several counties, and that, when so elected, they came to the Parliament for the whole of the counties.*

This principle is the source of several rules of Parliamentary law. One of these rules is that the electors cannot, either before or after his election, bind their representative by any instructions. It has never been doubted that all proceedings of the House of Commons would be valid, notwithstanding the unanimous and avowed disapproval of every elector in the kingdom. It has even been expressly denied that any subject may petition Parliament, although he may petition the King ; and there is no doubt that the modern system of political petitioning was altogether unknown in our earlier constitutional practice.† Nor has a constituency any remedy, during the continuance of

* 1 *Lords' Report*, 366. † Hallam, *Const. Hist.*, iii. 269.

Parliament, against any proceedings of its representative, however deeply it may be aggrieved by them, and however publicly and strongly it may express its disapproval. A member is under no legal obligation to consult with his constituents, or to inform them of his opinions or his intentions, or to pay any attention to any expression of their wishes. They have chosen him as their representative and plenipotentiary during that Parliament; and while that Parliament lasts, they can neither revoke their appointment nor restrict, by any directions, the powers that they have conferred. In the discharge of their duty they have cast upon the person whom they elected as their representative the duty of advising the King to the best of his judgment. That responsibility the law will not allow him to evade by rendering himself the mere mouthpiece of the sentiments of others.

Again, the same person cannot represent, at the same time, two places. If the House of Commons were merely a Congress of Deputies, there could be no reason why one person should not appear for any number of clients or hold any number of proxies. But such is not the Constitution of Parliament. It is a National Council, for which, from motives of convenience, local machinery of elections is used. The representatives of the various parts of the country do indeed assemble; but it is as a portion of the Council of the Crown that they meet. Each representative is, as I have already said, the contribution of his constituents to that council. If, then, the same person were to act as the representative for two places simultaneously, the aggregate amount of such contributions would be by so much diminished.

This principle also assists us in determining the question whether pledges as to their votes upon specific political questions should be required from candidates. The

practice of exacting such pledges appears to have been connected with the great political movement which began to manifest itself at the close of the first decennium of George the Third. It first attracted public attention at the general election of 1774. It was then encouraged by Wilkes, and at the following election was denounced by Burke. Under the exciting questions of modern times and the increasing interest in public affairs the practice has become common, and has even been defended on constitutional grounds by Sir T. E. May.* It is, however, beyond dispute that the law does not take any notice of any such pledge: and that such a promise can bind the person who gives it only in conscience and honour, but not otherwise. Such a promise could only in contemplation of law be regarded as an attempt to evade that principle which exempts the representative from all coercion in his communication with his constituents. It seeks to establish indirectly that influence the direct exercise of which the policy of the law will not allow. But it may also be observed that, if it be wrong for a minister to pledge himself to give or to abstain from giving certain advice to the King irrespective of the actual exigencies of the public service, a similar restraint cannot be rightly imposed upon a member of the highest council of the Crown. A person thus bound by promises, whether he be a servant of the Crown or one of the national representatives, is fettered in the performance of his duty. The minister, who is not necessarily a member of the House of Commons, may fail in his duty only to the Crown; but the representative, since he has a double function, will fail in his duty both to the Crown and to his constituents. A representative in Parliament is not sent there to register his own or his

* *Const. Hist.*, i. 445.

constituents' local prejudices or selfish objects. He must hear before he decides. The theory of the Constitution as it is expressed in the writs of summons requires him to form his opinion "of Common Council," that is to say, after he has associated with other representatives, and after he has received all the information that the Crown is able to supply. He may find in altered circumstances or on more accurate knowledge good reason to modify or even to reverse the opinions which he expressed to his constituents. Thus Sir Robert Peel declared in 1819, on the Resumption of Cash Payments, and again in 1846 on the Repeal of the Corn Laws, that his opinion was changed not by theoretical arguments but by the evidence of practical men or by the altered state of circumstances.* Even while the representative retains that opinion, he may find that it is expedient to accept a compromise. It is, in short, his duty to advise the King not upon abstract political principles, but upon matters of state as they arise. It is impossible that he should advise freely unless he be himself free. He should not therefore be required to bear upon his honour a burthen which the policy of the law steadily refuses to impose.

§ 5. Although the structure of the electoral organ may be adequate, and although the nature of its functions may be rightly understood, its action will be useless, or even prejudicial, unless it be undisturbed by external interference. The Legislature should, in the words of the Bill of Rights, lawfully, fully, and freely represent all the estates of the realm. The places, therefore, which should return representatives, and the persons in those places by whom the representatives

Independence of House of Commons.

* See Sir G. C. Lewis, *Administrations of Great Britain*, 430, *note*.

should be chosen, ought to be ascertained by law, and not left to the discretion of the Executive. When the persons so authorized proceed to exercise their functions, their election ought to be free. The Crown ought not, either by its coercive power or by its persuasive influence, to interfere with the expression of the genuine sentiments of the people. The choice of the electors also within the limits prescribed by law ought not to be limited to any particular class of men; and the decision of controverted elections ought to be secured by the known and efficient guarantees of judicial inquiry.

We have seen that in the House of Lords the Crown cannot withdraw even temporarily the power that it has conferred upon a Peer; but that it can confer this power without any other limit than such as its own discretion may impose. The same description will equally apply to the original power of the Crown over the House of Commons. There can be no doubt that the spirit of the Constitution required the representation of all the communities of the realm; and that for the purposes of representation the old and well-known division of counties was recognized by law. To no county or to no town accustomed to representation would any King have attempted to refuse his writ. The writs to such places were *ex debito justitiæ*.* No King thought of excluding from his Parliament Kent or Bristol, or of giving additional members to Yorkshire or to London, more than he thought of enabling the half-blood to inherit, or a feoffment to operate without livery of seisin. The succession, therefore, of the representatives of counties, and of many towns, has been unbroken from the earliest times of Parliaments. In other towns, however, their political pedigree is often

* 4 *Inst.*, 1.

incomplete. The number of boroughs that returned members varied very much at different times. Sometimes towns, such as Torrington and Chard, succeeded in obtaining exemption from the burthen of Parliamentary attendance, and never resumed the privilege they had abandoned. Sometimes from the misconduct of the Sheriffs, and sometimes, perhaps, from the commands of the Government, boroughs which had previously received writs were omitted in subsequent Parliaments. In many instances these discontinued boroughs were revived. At length, in the reign of James the First,* the House of Commons resolved that any town which had at any former time possessed the right of returning representatives was entitled to its writ. Thus the abolition of boroughs by the Crown alone was rendered impossible. Nothing, except an Act of disfranchisement, can now operate to deprive an existing borough of its vested right.

The prerogative, however, was more frequently exercised in the gracious bestowal of electoral franchises than in the withdrawal of previous favours. Yet even of this branch of the Royal authority the exercise was exclusively confined to towns. There are, indeed, precedents in the times of the First and the Third Edwards in which representatives were summoned by the Royal writ from Wales and Ireland, when Welsh and Irish affairs were under discussion. These instances, however, were exceptional, and may be classed with those cases where witnesses or other skilled persons were summoned to give proper information to the King in his Great Council. No permanent alteration in the county representation has ever been made except by Act of Parliament. Chester and Durham had been Counties Palatine long before the commencement of representation

* Hallam, *Const. Hist.*, iii. 38.

They had their own political institutions, and were not included in the counties whose services the Royal writ was entitled to demand. Wales was, in the time of Edward the First, not in a condition to share habitually in the councils of the conquerors, and Monmouth was practically a part of Wales. In the reign of Henry the Eighth these forms of concurrent sovereignty were abolished, and the political organization of Wales was completed. Members were accordingly assigned to the several counties and the principal towns which they respectively contained. From this extension of the electoral rights Durham was excluded, probably, as Mr. Hallam suggests,* in consequence of its attachment to the old religious system. Several attempts were made during later years to include this county within the political sphere; but it was not until the reign of Charles the Second that an Act to accomplish this object was passed. In respect to towns, however, the prerogative alone was sufficient. Edward the Fourth † set the example of granting by special charter to the town of Wenlock the right of election. Edward the Sixth created fourteen boroughs, and restored ten whose privileges had been lost.‡ Mary added twenty-one members; Elizabeth sixty; James the First twenty-seven.

There can be little doubt as to the motives of these grants. They were designed to strengthen the authority of the Crown, especially in the successive changes of religion. It is a significant fact that sixteen of the new boroughs which were created during the last three Tudor reigns were situated in Cornwall, where both from its property and still more from the peculiar jurisdiction of the Stannary Court the influence of the Crown was predominant. The administration of the sister kingdoms, too, which often

* *Const. Hist.*, iii. 38. † *Ib.*, 41. ‡ *Ib.*, 38.

sheds a lurid light upon English political events, indicates the purposes for which the prerogative was thus exerted. In Ireland the need of legislation for the enlargement of the county representation does not appear to have been recognized. Queen Mary erected both counties and boroughs. Queen Elizabeth largely increased the number of counties. Writs, too, seem to have been sometimes withheld from counties at the discretion of the Government. The object of these proceedings was to balance the more independent Anglo-Irish representatives by the retainers of the Court. James the First created at once a batch of more than forty boroughs. The Lords of the Pale remonstrated* against this proceeding; and expressed their apprehension that the erection of so many insignificant places into boroughs was designed to introduce very penal laws in matters of religion, and that "the general scope and institution of Parliaments would be thus frustrated." Their remonstrance only elicited a reply more forcible than gracious. After the reign of James no considerable additions were made by virtue of the prerogative to the English House of Commons. Charles the First created no new boroughs. In 1677 Charles the Second conferred by his Charter on the town of Newark the right of returning two members in Parliament. The grant was discussed at the time in the House of Commons, but its validity was ultimately admitted.† This case was the last instance of the exercise of such a power. The prerogative has been silently abandoned; and since the regulation of the constituencies by the Act of 1832 it must be taken to have entirely ceased.

"And because elections ought to be free, the King commandeth upon great forfeiture that no man by force of

* Hallam, *Const. Hist.*, iii. 379, *note.* † *Ib.*, iii. 39.

arms nor by malice or menacing shall disturb any to make free election."* The elections which this Act contemplated were probably those of sheriffs, coroners, and other officers who were at that time appointed by popular election, and not those for the comparatively unimportant and burthensome place of Parliament men.† It is construed, however, to extend, as Lord Coke informs us, to all elections as well by those that at the making of this Act had power to make them as by those whose power was raised or created since that time. "This excellent and necessary Act," the same great commentator‡ continues to observe, "is excellently penned in two respects. First, for that generally it extendeth to all elections, that is to say, to every dignity, office, or place elective of what kind or quality soever. Secondly, the Act is penned in the name of the King, and therefore the King bindeth himself not to disturb any electors to make free election." This principle has subsequently been often affirmed. In 1406 it is enacted that the electors "in the full county shall proceed to the election freely and indifferently, notwithstanding any request or commandment to the contrary." That is, as Lord Coke§ expounds it, "*Sine prece* by any prayer or gift, *et sine precepto* without commandment of the King by writ or otherwise, or of any other, which was a close and prudent salve not only for that sore, but for all other in like case; and is but an Act declaratory of the ancient law and custom of Parliament." There is a letter from Henry the Sixth to the Sheriff of Kent in which, after stating that sundry persons are busy in choosing the Knights "nothing to the honour of the labourers, but against their worship and against the laws and ordinances

* *Statute of Westminster the First*, cap. 5.
† Reeves, *Hist. of Eng. Law*, ii. 109.
‡ 2 *Inst.*, 169.
§ 7 Henry IV. c. 15; 4 *Inst.*, 10.
‖ Parry, 188.

of the land," he charges the Sheriff to declare openly, at the time of election, that the Royal will is that "the said shire has its free election according to the laws and ordinances; and that if any man, of whatever estate, degree, or condition, attempt the contrary, he shall run in the King's grievous displeasure." In the last year of the same reign an Act* was passed annulling all the proceedings of the preceding Parliament held at Coventry, as having been unduly summoned, and many Knights, citizens, and burgesses having appeared without any or due election, against the laws and the liberties of the Commons. The children of Henry the Eighth not merely created, as we have seen, new boroughs, but directly and avowedly interfered with elections.† But by far the most serious interference in our history with the freedom of election was the regulation of boroughs under the last two Stuart Kings. Legal proceedings were taken under various pretences by Charles the Second against these boroughs which were especially favourable to the Whig party. Upon the forfeiture or the compulsory surrender of their charters new charters were granted to these towns, vesting the franchise exclusively in a very small number of persons upon whom the Government supposed that it could rely. Under James the Second these reformed corporations underwent in their turn, in some cases even two or three times, a further purification. Some towns had their constituencies reduced to twelve or thirteen;‡ and the electors were sworn to support the candidate recommended by the Government. This violation of charters, this wilful falsification of popular feeling, is described by Mr. Hallam§ as "the great and leading justification of that event which drove James the Second

* 39 Henry VI. c. 1.
† Hallam, *Const. Hist.*, i. 45.
‡ Macaulay, *Hist. of Eng.*, ii. 335.
§ *Const. Hist.*, ii. 452.

from his throne." Accordingly one of the grievances charged against that King in the Declaration of Rights was his violation of the freedom of election: and the corresponding declaratory enactment contains a positive assertion that elections of members of Parliament ought to be free. The last trace of this systematic interference occurs shortly after the Revolution. The Warden of the Cinque Ports had claimed the right of nominating the members who were to serve in Parliament for these boroughs. This claim was of course not suffered to remain dormant in the time of James the Second. After the accession of William and Mary, on the complaint of the Ports that they were required not to engage their votes for any person as "the King would recommend to them such persons as he should think convenient for them to choose," an Act of Parliament* was passed which declared that the Warden's claim was contrary to the ancient usage, right, and freedom of elections.

Lord Coke† observes that the substance of the writs of summons "ought to continue in their original essence without any alteration or addition unless it be by Act of Parliament. For if original writs at the Common Law can receive no alteration or addition but by Act of Parliament, *a multo fortiori* the writs for the summons of the highest court of Parliament can receive no alteration or addition but by Act of Parliament." This principle seems to date from the latter part of the reign of Edward the Third, the period at which the development of the House of Commons becomes distinct. Prior to that time the Crown did not hesitate to indicate the class of persons whose counsels it desired to have or to avoid. The epithets‡ by which the earlier writs describe the Knights, citizens, and burgesses

* 2 William and Mary c. 7. † 4 *Inst.*, 10.

‡ See Parry's *Parliaments*, xxii.

whose election they command are both quaint and varied. The representatives are to be "of the better men" of their respective classes; or of the wiser, the more lawful, the more fit, the more eloquent, the more able, the more able to labour, or strong and of good faith, and loving the public good. Sometimes an option is given, and sometimes it is expressly withheld, of sending in place of Knights discreet freemen of the county, or Serjeants—that is, in the language of a somewhat later date, Esquires. Sometimes the Knights must be *gladio cincti*—that is, Knights by order, and not by tenure merely. Sometimes the Knights or Esquires are to be more approved and expert in acts of arms; and the citizens and burgesses are to have a better knowledge in navigation and the practice of merchandise. No express disqualifications are mentioned in the writs of the first two Edwards. But in 1331, under Edward the Third,* the Sheriffs were commanded to return "two of the most proper and sufficient Knights or Serjeants of the said county that are the least suspected of ill designs or common maintainers of parties." In 1351 the writs prohibit the election of maintainers of suits and of quarrels or who live by gain of this kind. These limitations appear to have proceeded from the prerogative alone; but in 1372 we meet with what may be regarded as the commencement of legislation upon the subject. At the close of the Parliament in that year, when according to custom the petitions of the Commons were read and answered,† a petition was among others granted "that no lawyer henceforward pursuing business in the Court of the King, nor Sheriff while in office, shall be returned as a Knight of the shire, nor those now so returned have any wages; but that Knights Chevaliers and Serjeants *des meulz vaues du pays*

* See Parry's *Parliaments*, xxii. and 96, *note*. † *Ib.*, 133.

shall be chosen in full county." It was under the authority of this Act* that the well-known clause prohibiting the election of lawyers was introduced into the writs of Henry the Fourth, which convened the *Parliamentum indoctum*. Lord Coke,† whose wrath at this insult to his profession is unmeasured, will not admit that this proceeding of Edward the Third was anything more than an ordinance of the House of Lords. But it seems to have been an enactment duly made according to the practice of the time. It was made upon the petition of the Commons, and it was enacted by the King with the advice and consent of the Lords Spiritual and Temporal. Nor is it difficult to understand its policy. Parliament was not then what it had become in the time of Lord Coke. A great part of its business was judicial, or at least semi-judicial. It was in contemplation of this business that maintainers were excluded. We are expressly told that the objection to the lawyers was that they put forward many petitions in the name of the Commons which only concerned their clients. It seems to have been usual at that period for great men to have lawyers as auditors of their estates. These lawyers received an annual stipend *pro consilio impenso et impendendo*, and were treated as retainers.‡ It is no small confirmation of this view that the Rolls of Parliament at this period are filled with proposals to change the ordinary course of legal process.§ A more satisfactory answer to the force of this statute is Lord Coke's suggestion that it was implicitly repealed, not indeed as he says by 5 Richard II., but by 7 Henry IV. Several Acts on the subject of elections were passed under the Lancastrian Kings. Ultimately, in 1446, in reply to a petition of the Commons for the observance of certain

* 46 Edw. III. c. 10.

† 4 *Inst.*, 47.

‡ Barrington, *Anc. Stat.*, 374

§ See Hallam, *Middle Ages*, iii. 118.

of these statutes, it is answered that "the King wills as is desired, so that hereafter the Knights of the shire be notable Knights of the shire for which they are chosen, or else such notable Squires, gentlemen of birth, as are able to be Knights, and no man to be in it that standeth in the degree of yeoman or beneath." Accordingly in the thirty-ninth year of this reign a county member* was unseated because he was not of gentle birth. The writs appear† to have been framed under this statute to the end of the reign of Charles the First.

The enforcement of these qualifications concerned the independence of Parliament almost as seriously as the power of imposing them. The jurisdiction as to disputed or improper returns seems to have originally rested with the King in Parliament, that is by the advice of the House of Lords. The Commons during many years do not appear to have interfered. By the 7th Henry IV. the writs, which had previously been returnable in Parliament, were made returnable in Chancery. It would appear, however, that, although the form of the writ was thus altered, the power of Parliament to examine the returns was not taken away. In the 8th Henry VI. the writ empowers the Justices of Assize to make inquiry touching returns made contrary to its exigency, and to inflict upon the offending Sheriff the penalties imposed by the 11th Henry IV.‡ Ten years afterwards,§ in consequence of a disorderly election of Knights for Cambridgeshire, the King by the advice of the Lords Spiritual and Temporal ordered that a writ should issue for a fresh election for that county. At length the Commons were able to claim a share in the exercise of that Parliamentary power which so nearly affected themselves.

* See Hallam, *Middle Ages*, iii. 119, *note*.

† Parry, xxiv.

‡ *Ib.*, 174 and 178.

§ *Ib.*, xxv.

In the reign of Mary, and still more conspicuously in the reign of Elizabeth,* that House exercised judicial control over election returns.

In the first Parliament of James the First both these prerogatives, as well as that of prescribing the qualifications of the representatives and that of determining the validity of returns, were discussed and practically abandoned. The King, in his Proclamation convening his first Parliament, gave to his new subjects out of his princely wisdom many wholesome counsels touching the mode in which they ought to exercise their franchise. Among other things he commanded that no bankrupts or outlaws should be chosen, but men of known good behaviour and sufficient livelihood. He further directed that all returns should be filed in Chancery; that all returns found contrary to the Proclamation should be rejected as unlawful and insufficient; and that both the place making the improper return and the person so returned should be punished. At the ensuing election for Buckinghamshire Sir Francis Godwin, who was an outlaw, defeated the Court candidate, Sir John Fortescue. In accordance with the King's Proclamation, the Court of Chancery declared the election void and issued a new writ. On the second election Sir John Fortescue was returned. The House, however, on hearing the case, directed Godwin to take his seat. The King insisted that returns could be corrected in the Court of Chancery alone. After considerable discussion between the King and the House the matter was compromised. The King acknowledged the House to be a Judge of returns, and requested them to set aside both elections and issue a warrant for another election.† Such a power as that claimed by the Crown was manifestly fatal to the independent action of the House of Commons. This

* *Const. Hist.*, i. 274.

† See Parry, *Parliaments*, 245; Hallam, *Const. Hist.*, i. 300.

truth seems to have been fully recognized by all parties. Accordingly, although no formal decision on the question was then given, the House of Commons did not hesitate, in 1672, to declare void the elections for which, during the long prorogation of Parliament, Lord Shaftesbury, as Chancellor, had issued writs, and over which he asserted his jurisdiction. The King was not inclined at that time to enter into any further dispute with the House of Commons, and Lord Shaftesbury was compelled to abandon the contest.* From that period the Crown has never attempted either to create an incapacity or to review a return. Nothing but an Act of the whole Legislature can limit the choice of the electors or deprive any subject of his capacity to take share in the councils of his country. As to the determination of disputed elections—although the proceedings are now regulated by Act of Parliament—it has long been recognized, both by the Courts and in statutes, that the authority is vested in the House of Commons exclusively.

§ 6. The representation of localities, the equal representation of electorates, the national function of the representatives, and the perfect freedom in their choice, are the fundamental and enduring characteristics of the House of Commons. These, however, are not the only features of its early constitution. Other principles, also, may be there traced which have not stood the test of time. These are, indeed, merely secondary, and their disappearance has been, for the most part, produced rather by social changes than by any deviation from our political type. Of these changes the most prominent and the earliest, and the most important in its political

Obsolete conditions of early representation.

* 4 *Parl. Hist.*, 507.

consequences, was in the law of Resiancy. The history of this law is in many respects interesting. Its principle was coeval with representation ; its fate is without a parallel in the history of English law ; and it affords a new illustration of the old truth, that measures apparently popular are often antagonistic to liberty. There is no room for doubt that originally members of Parliament were required to be residents in their respective electorates. The early writs invariably command the election of two Knights *de comitatu tuo,* and in like manner of citizens and burgesses of each city or town in the bailiwick. In the first year of Henry the Fifth an Act was passed expressly providing that the Knights shall be resident, at the time of their election, in the counties for which they shall be elected, and that the election for cities and boroughs shall be of citizens resident and enfranchised in the same cities and boroughs and none others. This statute, which was merely declaratory of the Common Law, was confirmed more than once in the following reign.* We cannot now trace the causes of that disposition to infringe upon the old custom which thus called for legislative interference. It may perhaps have been due to the desire of employing the services of professional men. We have seen at least that practising lawyers were excluded ; and Lord Coke† tells us that their exclusion from the "lack learning Parliament," by the "grevious complaints" which it excited gave rise to the Act of 7th Henry IV. But to whatever circumstances it may have been due, the tendency against the old restriction was too strong to be resisted. Non-resiants were constantly elected. Under Elizabeth a bill‡ to permit the return of non-resiant citizens and burgesses was discussed in the House of Commons, but does not appear to have

* Parry, xxiv. † 4 *Inst.*, 10. ‡ Parry, 218.

reached its third reading. In the reign of James the First the House of Commons expressly decided that the election of non-resiants was good; and even seemed disposed to punish a Sheriff who, acting upon counsel's opinion, refused to return a non-resiant Knight.* At last, in 1681, Lord Chief Justice Pemberton ruled† that "little regard was to be had to that ancient statute (1 Henry V.) forasmuch as the common practice of the kingdom had been ever since to the contrary." No similar stretch of judicial authority is recorded in our books. Finally, in the reign of George the Third, the suitable end of this unhonoured existence tardily arrived, and the Act was finally repealed.‡

This limitation was originally designed to secure a trustworthy statement of the wants and the opinions of each electorate. But for its continuance another and different reason prevailed. The old restriction was sometimes useful as a protection against the nomination of the Crown or of the neighbouring nobles. This reason is distinctly avowed§ in the debate upon the bill of 13th Elizabeth; and instances were there cited where the prohibition of the law was returned as an excuse for refusing to accept such nominations. In the following reign we find the corporation of Ludlow taking refuge under the same shelter against an unwelcome mandate from the Lord Treasurer Salisbury. But even those who on these grounds defended the old law were not insensible to its inconveniences. A compromise was suggested in the debate to which I have referred, that one of the members for each borough should be a gentleman resident, if not actually in the town, at least in its neighbourhood, and that the other should be "a man of learning who could speak." The principle

* Parry, 271. † *Onslow v. Repley*, Lord Somers's *Tracts*, viii. 271.
‡ 14 Geo. III. c. 58. § Parry, 219.
‖ Gardiner's *Hist. of Eng.*, i. 450.

of resiancy was indeed inconsistent in two respects with our political development. While this law was in force and the motives upon which it was founded were influential, no true conception could be formed of our national representation. Further, if it had been enforced the great popular movement of the seventeenth century would have wanted its most prominent intellectual leaders. In the time of the Tudors, and even for some time afterwards, none of the country gentlemen had or could acquire any political skill. Statesmanship was then exclusively confined to the servants of the Crown. The country party was therefore obliged to seek its leaders from the Bar; and for the most part the leaders thus chosen could not and did not reside in the towns which they represented. Nor was the influence of the lawyers confined to the services, great though they were, which they rendered in their capacity of leaders. It was their professional habits and modes of thought which gave to the contest that strong legal character* which it never afterwards lost.

Another change that time has wrought in the Commons of the Plantagenets relates to the payment of members for their services. This practice, like that of resiancy, was coeval with representation. The writs *de expensis levandis* date from the reign of Henry the Third. In subsequent reigns they were issued with as much regularity as the writs of summons. The payment was levied on the several constituencies; and was calculated for the actual period of attendance, and for the time spent in going or returning according to the distance in each case of the representative from the place at which Parliament met. At first the rate of wages varied according to the rank of the representative or the dearness of the season or other considerations. A

* See Gardiner's *Hist. of Eng.*, i. 178.

Knight by order was paid more than an Esquire, and the latter more than a citizen or burgess. Finally the rate settled down at four shillings a day for Knights of the shire, and half that sum for representatives of towns. Few questions of those times excited greater interest than this payment of members. It could not be denied that, as the earliest writ of this kind alleged,* the Knights in the discharge of their duty had "made a longer delay than they expected, and had thereby incurred no small expense which it was fit that the commonalties electing them should defray, and not themselves." But although the actual charge might be reasonable, the necessity for incurring it was not on that account the less disagreeable. Protracted and frequent meetings of Parliament were consequently highly unpopular. The Parliament which met in 1406 was continued by prorogations for nearly a year. So lengthened a period had never before been known. Several contemporary writers† concur in describing this innovation as "a great blot on this reign." It was said to be "a great loss and damage to the commonalty, for the expense of their representatives was almost equal in value to the sum demanded for the subsidy." But as some attendance upon Parliament was unavoidable, individual communities earnestly struggled to escape, where they could, the charge; or if the burthen was inevitable, quarrelled among themselves as to its incidence. Towns, where the liability to contribution hardly admitted of dispute, had recourse to various expedients to escape the burthen. Poverty seems to have been accepted as a legal excuse.‡ For nearly a century the sheriffs of Lancashire alleged in their returns this claim to exemption for the boroughs in their bailiwick. Some boroughs § such

* Parry, xxxii.

† See Parry's *Parliaments*, 166.

‡ Hallam, *Middle Ages*, iii. 115.

§ Roberts, *Southern Counties*, 469.

as Chard steadily persisted in not making any return; and it was probably thought useless to compel them. Torrington obtained a charter of exemption. Colchester was excused for five years in consequence of the expense it had incurred in the erection of fortifications. Norwich was so aggrieved at a summons to elect four citizens, in circumstances apparently similar to those of Bristol,* that it paid, as we have seen, a considerable sum for those times to avoid the infliction. In the counties, on the other hand, where there was in ordinary circumstances no escape from representation, the contest turned upon the persons liable to contribute to the wages. Sometimes the tenants of the Lords claimed exemption. Sometimes franchises beyond the jurisdiction of the Sheriff refused to contribute. Sometimes it was insisted that lands formerly contributory ceased to be liable on passing into the hands of Lords of Parliament. Sometimes the Sheriffs sought to extend the rate not only to the freehold tenants of the Lords and Bishops but also to their villeins. Many of these disputes seem to have been settled by a statute of 1388,† of which the policy was evidently to widen the area of contribution. But under the Lancastrian Kings the question of wages was the subject of frequent petitions from the Commons.

The natural laws which regulate the remuneration of services apply to the wages of members of Parliament not less than to those of their humblest constituents. Accordingly we find at an early period that competition largely influenced Parliamentary prices. There is extant an indictment of the Sheriff of Lancashire for that, in the fourteenth year of Edward the Second, he had returned two persons as Knights of the shire without the assent of the County

* See Perry's *Parliaments*, 163. † 12 Rich. II.; Parry, xxxiv.

Court, and had levied twenty pounds for their expenses in attending the Parliament at Westminster,* "whereas the county could by their own election have found two good and sufficient men who would have gone to Parliament for ten marks or ten pounds." In the third year of Edward the Fourth the burgesses of Weymouth† were fortunate in obtaining the services of John Sackvylle for one cade of mackerel, which was half the usual rate. In this reign, indeed, there is evidence that the possession of a seat in Parliament was greatly desired by country gentlemen.‡ But subject to such special agreements the old practice continued for nearly a century later. In the sixth year of Henry the Eighth members were forbidden to depart from Parliament or to absent themselves without leave on pain of forfeiture of their wages. In the twenty-seventh and thirty-fourth years of the same reign the Acts which extended the electoral franchise to Wales and to Cheshire § carefully made provision for the payment of the new Knights, citizens, and burgesses. The issue of the usual writs has been traced to the end of this reign.|| In the reign of Edward the Sixth it is recorded¶ that John Wadham agreed to serve for Melcombe without pay. But the reign of Elizabeth may probably be taken as the period at which honorary service in Parliament became general. The importance of the House of Commons had greatly increased. The wealth of the country had also increased. Four shillings and two shillings were much less important sums to the subjects of the Tudors than they had been to the victors of Cressy or of Agincourt. The remuneration in honour thus became a sufficient inducement to serve.

* Palgrave, *Truths and Fictions of the Middle Ages*, xvii.
† Roberts, 472.
‡ *Middle Ages*, iii. 119, *note*.
§ Parry, xxxv.
|| *Middle Ages*, iii. 114, *note*.
¶ Roberts, 472.

without the inducement in wages. It is of course impossible to fix a precise date for a change which was probably gradual. Sir Simonds D'Ewes, a high Parliamentary authority in the time of Charles the First, alleges * that the custom of members bearing their own charges led to the resumption of their abandoned franchise by several towns, both in the reign of Elizabeth and of James. In the debates on the subject of wages in the House of Commons in 1677 it was asserted that for nearly one hundred years the practice had been disused, a date which would bring the commencement of a change about the middle of Elizabeth's reign. In the same reign, too, we meet with a very significant occurrence. The competition for seats had gone so far that the prudent Mayor of Westbury found that an election, so far from being burthensome, could actually be made profitable to his town. The borough accordingly returned, in consideration of the sum of four pounds, one Walter Long, "a very simple and unfit man," who, on being questioned how he came to be chosen, confessed the entire arrangement. The election was declared void, and the mayor and his accomplices punished—a very hard measure, as they must have thought, for doing what they liked with their own. But although the right has long been in abeyance, the legal obligation of constituencies has never been removed. In the Long Parliament of Charles the Second the arrears due to members must have amounted to a considerable sum. Accordingly when one of its members, Sir Thomas Shaw, sued out his writ *de expensis* against the town of Colchester, a general alarm † was excited; and a bill was introduced to exonerate the electors from the payment of wages to any member of that Parliament. This measure, however, did not become law; and the old

* Parry, 222. † *Ib.*, 579.

common law right still remains. The last instance in which it was exercised appears to have been in 1681,* when, in the fourth Parliament of King Charles, John King sued out his writ against the burgesses of Harwich.

It thus appears that by our ancient constitutional usage no persons were bound to serve in Parliament gratuitously; that the payment of members was a charge upon the communities which those members were chosen to represent; that this payment was originally intended merely as an indemnity and not as a source of gain; and that the disuse of this practice is due to the influence of social changes, and not to any formal alteration of the law. This ancient remuneration for public service thus differs widely from that form of payment of members which has been advocated by some modern political reformers. The latter project contemplates payment not by the constituencies but by the state. Such an arrangement would be equivalent to the creation of so many salaried offices of which the patronage was vested in the several constituencies. Daily experience shows the carelessness with which appointments are made even in cases directly affecting men's own interests, where the sense of that interest is dulled by being shared with a large number of persons. When, therefore, a large constituency has the patronage of a lucrative office for which the funds are supplied from without, there can be neither any sense of interest in dealing with their own property, nor any sense of responsibility in dealing with the property of others. There are thus no guarantees for care in selection. On the other side there would be in such circumstances a strong and increasing tendency towards a misuse of the power. It is not probable that any such remuneration

* Lord Campbell's *Chancellors*, iii. 420.

would be offered as would in any prosperous community induce men who were actively engaged, with good prospects of success, in professional or industrial pursuits to devote themselves to Parliamentary duties. But even a moderate payment would be a strong inducement to inferior candidates. Politics would thus become a regular occupation, followed like other occupations chiefly for its pecuniary results, but ill paid, precarious, and depending for its success rather upon the favour of others, than upon personal merits. "Such an institution," says Mr. Mill,* "would be a perpetual blister applied to the most peccant parts of human nature. It amounts to offering 658 prizes for the most successful flatterer, the most adroit misleader of a body of his fellow-countrymen. Under no despotism has there been such an organized system of tillage for raising a rich crop of vicious courtiership."

It was also a part of our ancient Constitution that every person duly elected to serve in Parliament was bound so to serve. Service in Parliament, as indeed the very term implies, was a duty cast in certain circumstances upon every person not expressly disqualified. This duty no person was permitted to decline or to evade; nor was it even competent for the Crown to exempt any person from its obligation. Under the Edwards and until the reign of Henry the Fifth† it was the duty of the Sheriff to take bail for the appearance of the representative chosen, and to return on the writ the names both of the new member and of his sureties. There are some curious returns in the Parliamentary Writs illustrative both of the strictness with which this rule of attendance was enforced, and of the reluctance to serve of the persons elected. Thus we read ‡ that John de la Pole was elected in the 16th Edward II. to serve as Knight of

* *Rep. Govt.*, 210. † Parry, xxi.

‡ See Palgrave, *Truths and Fictions*, xvi.

the shire for Oxford, but that he escaped into the "Four Hundreds and a half" of Chiltern. The Sheriff, however, was able to secure his colleague, John de Harecourt, and took security for his appearance from John Bokenore and John Bovetown. So, too, another Sheriff returned that the Knight elected to serve had no land within his bailiwick, and that no one in the county would answer for his appearance. Lord Coke tells us* that "the King cannot grant a charter of exemption to any man to be freed from election of Knight, citizen, or burgess of the Parliament (as he may do of some inferior offices) because the election of them ought to be free, and his attendance is for the service of the whole realm and for the benefit of the King and his people, and the whole commonwealth hath an interest therein; and therefore a charter of exemption that King Henry the Sixth had made to the citizens of York of exemption in that case was by Act of Parliament enacted and declared to be void." It is a consequence of the same principle that members are bound actually to attend during the whole time that Parliament is sitting. Several Acts were passed at various times to enforce this duty; and, although the Crown does not now interfere, the House of Commons claims and exercises the right of compelling, when it thinks fit, the presence of all its members. In later times this power is only exercised upon a call of the House, and even then not with much rigour. The number which was formerly regarded as sufficient for merely formal business is now regarded as sufficient for all purposes of legislation; and the neglect of members to attend to their duties is practically left to the censure of their constituents. So, too, the obligation to serve and to continue to serve during the continuance of the Parliament has been relaxed,

* 4 *Inst.*, 49.

although by a different method. The Chiltern Hundreds continue, though in a different sense, to afford in the days of Victoria to unwilling legislators the protection which they afforded in the days of Edward the Second. They owe, however, their present efficacy to the skilful application of a statute which certainly was not made with any such design. Under the Act of Anne* which regulates the tenure of office under the Crown by members of the House of Commons, every member on accepting an office of profit thereby vacates his seat. When any person, therefore, desires to leave Parliament, he applies for the office of Steward of the Chiltern Hundreds or some similar place. Except in peculiar circumstances the office is granted as of course ; the vacancy is produced ; the office is immediately resigned ; and is thus continually granted and resumed as occasion may require.

§ 7. We have seen that the members of the Lower House of Parliament represented their respective communities. What persons were included within each community is a question of some difficulty. Two conflicting opinions have been held respecting the origin of the county franchise. Some antiquarians maintain that the first electors were exclusively tenants in chief of the Crown. Others contend that all freeholders in the county, without regard to tenure, were entitled to vote. As is usual in such cases, the truth must be sought at an intermediate point. The better opinion seems to be that the Crown tenants formed originally the constituent body ; but that at an early period, perhaps under the first two Edwards, certainly before the accession of the House of Lancaster,† all the freeholders of the county, without

The original electors in counties.

* 6 Anne c. 7.

† 1 *Lords' Report*, 330.

regard to tenure, were accustomed to vote. The evidence in support of the original restriction is very strong. The assemblies at which these representatives appeared were primarily convened for the granting of money; and on feudal principles it was to his tenants that the King was expected to look for assistance. In Scotland, where the feudal principles were generally more distinct than in England, none but tenants *in capite* exercised, prior to 1832, the electoral franchise. In Kent a custom was recognized that Crown tenants should be exclusively liable for the wages of Knights of the shire.* Such a custom is hardly explicable on the assumption of the antiquity of the wider franchise, but is readily intelligible on the theory of expansion. In the reigns of the first Edwards the Lords Spiritual and Temporal made grants to the Crown, not only in their own behalf, but in behalf of their tenants.† These Lords also claimed for their lands exemption from contribution to the wages of Knights of the shire, a claim which, except as to after-acquired lands, was recognized by statute.‡ Thus the tenants of the greater and specially-summoned Barons must have been held to be sufficiently represented in Parliament by their Lords; and they were not therefore, although doubtless suitors in the County Court, concerned in county representation. In the case of the other counties, the freeholders were not so successful as the men of Kent in establishing their privilege, but they were far from silent on the subject. The records of Parliament are, as I have already remarked, full of complaints and disputes regarding the incidence of the charge for Knights' wages. But if the mesne tenants had in theory the right to elect, their obligation to contribute could not have been denied. If, on the other hand, these tenants did

* 1 *Lords' Report*, 364. † *Ib.*, 365.

‡ 12 Rich. II. c. 12.

not in fact concur in the election, there would have been no pretence for attempting to impose on them such an obligation.

The argument * in favour of the original right of all freeholders to the franchise rests upon the facts that the elections were made in the County Court, and that in this court all freeholders, and not merely tenants *in capite*, were suitors. These facts, however, are not necessarily inconsistent with the more restricted theory. It was doubtless convenient that the elections should be held at the general meeting of the county. But there was no reason to suppose that any other suitors except those directly interested would concern themselves in that portion of the business. Persons, as the Electoral Act of Henry the Fourth implies, might be present at the County Court, and yet might not be entitled to take part in the election. The duty of election was a burthen and not an advantage. No claim, therefore, to the franchise would be made, and no difficulty would arise. It was only when the question of contribution to the Knights' wages came on that the extent of the franchise was felt to be practically important. If it be clear that elections were held in full court, and that all freeholders were suitors, it is not less clear that these freeholders, who were not tenants *in capite*, were not considered as represented by these Knights, and were not bound to contribute to their wages. The inference therefore seems to be that in this case, as in many others, the general words must be restrained by the circumstances to which they refer, and that the election was made in full court by those suitors who were concerned in it.

A partial explanation of the extension of the franchise is found in the increased number of Crown tenants by the

* *Ed. Rev.*, xxii. 346.

operation of the Statute *Quia Emptores*.* By that Act the process of subinfeudation was prohibited; and every alienation by a tenant in chief of any portion of his land created in respect of the land so alienated a new tenancy in chief. The elections, too, were made in County Court at which freeholders of all kinds attended. Where the election was uncontested, there would be no means of distinguishing between the acclamations of the Crown tenants and of the non-electing freeholders. If there was a contest, it would be difficult to reject in the hurry of an election a claim to vote which might involve disputed questions of title.† But this extension was probably due most of all to the anti-feudal policy of Edward the First. He desired to substitute general subsidies for feudal aid. For this purpose the concurrence of all freeholders, apart from all distinctions of tenure in the election of representatives, was on the ordinary principles of common consent essential. It may have been for this reason that the writs are careful in directing elections to be made in "the full county"—that is, in the County Court, where all freeholders were bound to attend. It may at least be seen that at this time the Crown looked with no disfavour upon the extension of the suffrage.

In the reign of Henry the Fourth all doubt upon the subject was removed. It was then expressly enacted‡ that "all persons present at the County Court, as well suitors duly summoned for any cause as others," should attend the election of their Knights for the Parliament. The object of this statute§ seems to have been the removal of uncertainty both as to the persons represented and the persons who were to elect; and its effect was that the Knights represented all freeholders whether tenants of Lords of Parliament or not; and that all

* 18 Edw. I.

‡ 7 Henry IV. c. 15.

† Hallam, *Middle Ages*, iii. 17, 218.

§ See 1 *Law Reports*, 357.

freeholders who attended at the County Court were entitled to choose Knights, and were bound to contribute to the wages of those whom they had thus chosen. This Act was soon found to require amendment. Whether the wide expressions which it contains were inadvertently used, or whether its policy was more liberal than the existing state of society would admit, we have now no means of ascertaining. All that is known on the subject is contained in the Amending Act itself,* which for upwards of four hundred years regulated the elections in the counties of England. Its preamble recites that "the elections of Knights of shires have now of late been made by very great outrageous and excessive number of people either of small substance or of no value, whereof every one of them pretended to have a voice equivalent as to making such elections with the most worthy Knights and Squires dwelling within the same county." The enacting part provides that the electoral franchise shall be confined to freeholders of lands or tenements of the annual value of forty shillings.

It is difficult, perhaps indeed it is impossible, to express accurately this qualification in language of the present day. Mr. Hallam,† writing in 1816, says that "sixteen is a proper multiple when we would bring the general value of money in this reign (that of Henry the Sixth) to our present standard." This calculation would therefore give us in round numbers a £30 franchise. Prynne,‡ in speaking of members' wages, records his opinion that forty shillings in 1660 were scarcely equivalent to four shillings when wages were first demanded. After allowance is made for the difference in the value of the pound sterling between the time of Edward the First and of Henry the Sixth, this

* 8 Henry VI. c. 7. † *Middle Ages*, iii. 369.
‡ Parry's *Parliaments*, xxxiii.

calculation is not very different from that of Mr. Hallam. If we take the price of wheat as a standard, the amount will be somewhat less. The average price of wheat during the first half of the fifteenth century was about 7s. a quarter.* The qualification therefore was equivalent to about six quarters of wheat. The average price of wheat from 1771 to 1855 was about £3 a quarter.† Thus the qualification would be an £18 freehold of our day.‡

§ 8. The origin of the borough franchise has been the subject of much controversy. A large part, however, of these discussions belongs to the mere polemics of the day; and the theories which they maintain may be dismissed with little ceremony. Two leading opinions remain which, as in the case of the county franchise, seem when combined to give us the truth. The first of these opinions is that the franchise depended on the payment of scot and lot, or the local rates and other charges upon the town; the other is, that it arose from burgage tenure. The early writs afford no information on the subject. They merely direct the Sheriff to return citizens and burgesses for every city or borough in his bailiwick; and neither distinguish between chartered and unchartered towns, nor prescribe any electoral body. It seems reasonable, therefore, to believe that the burgess who came for himself and for his community was chosen by burgesses, that is by the free inhabitant householders of the borough, members of the court leet and subject to its jurisdiction, and liable to contribute to all the burthens, whether local or general, of the borough. This view was adopted by a Committee of the House of Commons which in 1623,

The original electors in towns.

* Tooke, *History of Prices*, vi. 397. † *Ib.*, 405.

‡ In Scotland the 40s. land of old extent was equal to 104 acres. See Prof. Innes, *Scotch Legal Ant.*, 284.

under the presidency of Sergeant Glanville, had occasion to investigate the entire subject. That committee, the members of which Mr. Hallam* describes as "the most eminent men, in respect of legal and constitutional knowledge, that were ever united in such a body," reported that "of common right all the inhabitants, householders, and residents within the borough ought to have voice in the election."† But although the burgesses of Domesday Book and of other early records were doubtless inhabitants of tenements in their respective boroughs, the quantity of their interest in these tenements must still be ascertained. Lord Holt and other eminent lawyers have inclined to the opinion that those only were burgesses within the primitive meaning of that term who held that description of freehold known as burgage tenure. This tenure was probably the original tenure under which town property was held. The inferior forms of tenancies are of comparatively modern date. The borough, even though unincorporated, possessed common property and enjoyed common privileges. Such permanent rights would naturally be confined to those who had a permanent property in the soil. But terms of years, even as early as the time of Edward the First, were not uncommon; and it became necessary to deal with the rights and the liabilities of the lessees. We find in several records examples‡ of persons being exempted from tallages on the ground that they did not participate in the liberties of the borough, and of others being expressly declared subject to these impositions as the condition of their being admitted to the rights of burgesses. It would therefore appear that those only who held by burgage tenure paid scot and lot; but that, at least in some cases, inhabitants who held estates less than

* *Const. Hist.*, iii. 40. † Glanville's *Reports*, 142.

‡ See Hallam, *Const. Hist.*, iii. 42.

freehold were allowed to pay scot and lot, or, in other words, were admitted to the liabilities and so to the rights of burgesses. It is probable that the usage with respect to the admission of such tenants was not uniform. In some boroughs the ancient exclusive rights of burgage tenants were maintained; in others, the equitable claim of taxable inhabitants having only a chattel interest was recognized. Thus the two species of franchise, which in the pre-reform days were found in the scot-and-lot and in the burgage-tenure boroughs, seem to have been gradually produced.*

§ 9. Such were the original electorates of England. The communities of the counties and the communities of the cities returned each their two members. The communities of the towns returned some two members, some but one, according to their size and wealth. The community of the county was understood to mean the freeholders of the county, from the middle of the fifteenth century no longer defined by tenure but restricted by amount of freehold property. The community of the cities and towns meant all the resident inhabitants who contributed to the local taxes. In most cases, though probably not in all, these expressions were equivalent. All the resident inhabitants contributed to the rates. All the contributories to the rates were resident inhabitants. The rural electorates were slow to change. They admitted among their ranks Chester and Durham. They received additions from without, although not entirely on the same footing as that of their own representatives, on the annexation of Wales, on the union with Scotland, and on the union with Ireland. But the representation of the English

The history of electoral changes.

* See Hallam, *Const. Hist.*, iii. 43.

counties was governed in 1832 by the Statute of 1429. The same counties sent up the same number of members, often indeed from the same families. The definition of an elector was the same when William the Fourth ascended the throne as it was in the days of Henry the Sixth. But even in the slowly-changing agricultural body the alterations of four centuries were visible. The forty-shilling freeholder of the nineteenth century was a very different person from the prosperous proprietor who, in the fifteenth century, was considered as entitled to vote with the most worthy Knights and Squires of the county. Even the sacred freehold had to compete with a novel and hardly less important interest. Almost at the very period at which the Act of Henry the Sixth was passed, forces were in operation which gave an impulse to the extension of the despised estates for years. In the reign of Henry the Eighth this interest had become so considerable that the Legislature thought fit * to protect it against technicalities by which the freeholder could fraudulently threaten its existence. But although this new interest, when thus secured, grew and prospered, no room was made for it in our electoral system. The tenant for life of a miserable kitchen garden was a member of the community of his county. The lessee for 999 years of the largest farm in England had no place in county organization.

The history of the second branch of the electoral communities was more varied than that of the counties. Both in the electoral rolls of each community and in the communities themselves strange anomalies had arisen. The old scot-and-lot qualification had in many places fallen into disuse. The elections were managed by the Mayor and Councillors. In many of the boroughs of late creation

* 21 Henry VIII. c. 15.

the franchise was expressly limited to the municipal functionaries. During the periods of triennial Parliaments, that is during the reigns of William and of Anne, when party spirit ran high and contests were frequent, and no special machinery for determining questions relating to controverted elections had been yet provided, the electoral rights in each borough were dealt with by the House of Commons according to the immediate exigencies of party warfare. It appears to have been at this time * that the electoral rights of corporations, sometimes large, sometimes very small, were recognized. By an Act of George the Second † the last determination of the House of Commons was made conclusive as to the right of elections. Some check was thus put to the continuance of this great grievance, but many absurd and unreasonable decisions were at the same time confirmed.

Nor was the state of the boroughs themselves less anomalous than that of the electors in each borough, although the causes of the disorder were different. Many towns which ought not to have been represented possessed full electoral rights. Many towns whose claim to share in the councils of the country was beyond dispute were unrepresented. I have already indicated some of the circumstances that led to this result. Many boroughs, even before the Commonwealth, were hopelessly insignificant. They seemed for the most part to have belonged to the ancient demesnes of the Crown, and to have been compelled on this account to attend in Parliament. When the practice of Parliamentary attendance was once established, these boroughs continued to send their members, although the significance of the ancient demesne had passed away. In some cases the misconduct of the Sheriff affected the

* Hallam, *Const. Hist.*, iii. 46. † 2 Geo. II. c. 2.

representation, although generally by deficiency rather than by addition. Many towns voluntarily abandoned or obtained exemption from Parliamentary service. At a later period numerous boroughs, and those generally of a manageable size, were added, for the purpose of strengthening the interest of the Court. But there was still a more potent cause for the anomalies of our representative system. In earlier times the southern and western counties of England were far the most populous and the most wealthy parts of the kingdom. In them were situated the great seats of national industry, and in them were consequently the greatest number of boroughs. The North was then a desert region, with a scanty and sparse population, which contributed little to the material riches of the country. But the great industrial events which marked the latter portion of the eighteenth century brought with them unexpected political changes. Political power must follow population and wealth. Population and wealth come in the train of industry. The seat of industry is determined by economy of cost.* That economy which had once been favourable to the South was now pronounced in favour of the districts where coal and iron were most accessible. The great storehouses of coal and iron were in the barren and despised districts that lay to the north of the Trent. These counties became the scene of an extraordinary immigration. The population, which under William the Third† was estimated at eleven hundred thousand, exceeded five millions when William the Fourth ascended the throne. Great cities sprang up with wonderful rapidity; and fortunes were accumulated which then seemed fabulous. But the Constitution had made no provision for these new interests; and the selfish policy

* See *Wakefield*, 307. † See Knight's *Hist. of Eng.*, v. 3, 47.

of the agriculturists* soon awakened the manufacturers of the North to a sense of their political depression. Then, after a contest that shook old England to its centre, the House of Commons experienced its first great organic change.

* See Roebuck's *Hist. of the Whig Ministry*, i. 6.

CHAPTER XIX.

THE CHECKS UPON PARLIAMENT.

The classification of Governments.

§ 1. The classification of Governments has always been a favourite subject with political philosophers. The division usually accepted rests upon the number of persons by whom the sovereign power is administered. According to the limitation or the extension of this number Governments are described as Monarchical, or Aristocratical, or Democratic, or as forming some combination of these principles. But this division is based upon the external form of Governments, and not upon their interior structure. It has reference to the persons who direct the organism ; but it overlooks the character of the organism itself. A better principle of division* seems to be the distribution of the sovereignty. The sovereign power may consist of one part only, or of several parts. If the political structure be simple, its functions will also be simple. If it be complex, its functions will be complex. In the former case there is an absolute Government ; in the latter a limited Government. The distinctive characteristic then of a free or Constitutional Government is the composite character of its sovereignty, and not the plurality of its sovereigns. The distinctive characteristic of Imperialism is the unity of its power, not

* See Calhoun's *Works*, i. 36.

the individuality of the person in whom that power is vested. If free thought, free speech, and free action be stifled or repressed, it matters little whether the tyranny be of one or of many. If the whole power of the state be centred in one body, if thought and speech and action depend upon the will of one person or one set of persons, that Government, whatever may be its designation and whatever its external form, is an absolute Government. It possesses the machinery for applying as it thinks fit the whole power of the community. There is no machinery by which any such application may be arrested. Such is the character of absolute sovereignty, whether it be Imperatorial or Democratic, whether it derive its origin from the sword or the ballot box, or whether it be exercised by one person or by many millions. Very different, however, is the Government of England. With us sovereignty rests with the Queen in Parliament. That sovereignty, as the term itself and the nature of the case implies, is as absolute as that of Diocletian or Napoleon. It admits no other limit than those which are set by our physical and moral nature. It might seem, indeed, at present inclined towards democratic absolutism. The enormous power of Parliament, and more especially of the representative portion of it, its legislative power, its direction, through ministers who are responsible to it, of all the powers of the Crown, its supervision of the Bench, the absolute control of the House of Commons over the finances of the kingdom, at first sight suggest a unity of power that the most centralizing Gaul could not contemn. But there is in reality no such unity. Power is diffused through different bodies of which the unanimous concurrence is required ; and it is exercised by each of them under powerful checks. These checks relate partly to the regulation by the sovereign body of its own proceedings, and partly to the external influences

to which these proceedings are subjected. I proceed, therefore, to consider the constitutional guarantees which are secured by the nature of our sovereign power, by the mode in which it habitually exercises its functions, and by the principal external circumstances which influence its will.

The influence of the Crown and of the Cabinet.

§ 2. I have already shown that Parliament possesses no independent authority. It is merely the council of the Crown. Its functions are deliberative, and the control which it exercises over every department of the Executive is indirect. Every act of state, although it may be performed solely in deference to the advice of Parliament, remains the act of the King. Before the final acceptance of the advice which Parliament tenders, the King has, in his powers of prorogation and dissolution, ample means of securing the fullest discussion, and of ascertaining beyond doubt the tendency of public opinion. Thus the Crown can always check, even if it cannot ultimately prevent, the adoption of a policy which it deems unwise. This power is at the present day neither impaired nor abandoned,* but is, as we have seen, exercised in a new and peculiar manner. Its agent now is the Cabinet. Thus the relation of ministers to Parliament raises a new check in our modern system of Parliamentary Government. The ministers are the natural leaders of either House. They facilitate the performance of Parliamentary functions, and they keep those functions within proper limits and in a steady course. It is their duty to prepare for Parliament all business connected with the administration, to make distinct proposals respecting the best means of raising the supplies required for the current year, and to reduce such

* See Lord Palmerston, 3 *Hans.*, clix. 1386.

proposals into a tangible form for the purpose of debate. In like manner it is their duty to suggest such improvements in the laws as the experience which they have acquired in the practical administration of those laws enables them to offer. The same facilities which ministers possess for ascertaining what the nation should follow, equally enable them to advise as to what it should avoid. It therefore becomes their duty to consider the probable effects of all propositions that non-official members bring forward, and to oppose such as they consider ill-judged or ill-contrived, or otherwise objectionable. They thus both themselves prepare business for the consideration of Parliament, and they criticise the business that is prepared by others. I need not dwell on the importance of these functions. They are essential to the successful working of our form of Parliamentary Government. They make the difference between an organized deliberative assembly and a mere mob. In any large number of people, if there be no organization, the sense of personal responsibility is lost in the numbers ; and no means exist for determining the real opinion of the assembly. Such a body, without some guidance, is helpless ; and if it refuse obedience to its leaders, its conduct will be uncertain, and its decisions unstable. It is the steadiness with which it generally acts,* and the care with which it avoids rash and inconsistent decisions, that especially distinguish the House of Commons from other popular assemblies. That these qualities are due to our ministerial system appears from the headstrong and capricious conduct of that House† at the time when its proceedings were not under the discipline of the present system, and from the difference in its working which we now observe under a strong and a weak

* Earl Grey, *Parl. Govt.*, 62.

† See Macaulay, *Hist. of Eng.*, iv. 434.

Government, that is when the House habitually follows or disregards the advice of the Administration.

Two points connected with this part of our political system deserve attention. The control of ministers, powerful though it be, does not in the least interfere with the fullest freedom of action on the part of individual members. That control is merely persuasive. Every member of Parliament may bring before the House to which he belongs whatever proposal he thinks fit, without leave asked of the Crown or of any committee. There are no Lords of Articles, as in the Scottish Parliament, or references to Standing Committees, as in the Congress of the United States. The House expects to hear on every such proposal the opinion of the Administration; and usually defers to that opinion, as to the opinion of persons in whose judgment it has confidence, who have the opportunity of forming a correct judgment upon the question, and whose duty it is to form an opinion. If the Administration approve of the proposal, its assent is evidence to the House that the proposed measure will probably be an improvement. If the Administration disapprove, most of its supporters will follow its advice. Such opposition therefore ensures that, if the measure be carried, ample proofs of its merits shall have been given.

We must also observe that this guidance of Parliament must be performed by ministers of the Crown, that is by persons actually holding high official rank and administering the great departments of state. Other persons may be versed in the affairs of state, and may possess both long experience and even have access to the official sources of information. To such persons their fellow-members will always lend an attentive ear. But their weight is far short of that which they would have if they spoke under the immediate responsibility of office, and as the persons

whose duty it would be to carry into effect the measure under discussion. Seats in the Cabinet have sometimes been given to persons without any recognized official rank. These arrangements have always been unsuccessful. Such a semi-ministerial state brings weight neither with the ministerial party nor with the Opposition. Thus, in Lord Aberdeen's ministry, Lord John Russell held for some time the novel rank of Leader of the House of Commons without any ministerial office. A proposal was made that, in consideration of its laborious nature, a salary should be attached to this position. The motion was ultimately withdrawn, after an admission from Lord John Russell himself that the creation of such an office apart from ministerial duties was, if not unconstitutional, at least inconvenient.*

The means of self-defence which each of the three branches of the Legislature possesses † is the power of disagreement. The means by which the ministry enforces its opinion is the power of resignation. Its responsibility is not taken away by any vote of Parliament. The act so advised is still the act of the Crown, and the principal servants of the Crown are responsible for it. Whether the pressure come from the Crown or from the Parliament, it is the duty of ministers either to resist it or to accept it and its consequences as their own. "If," says Earl Grey, ‡ "they continue to administer the affairs of the country when powers they think necessary have been refused, or a course they disapprove has, in spite of their advice, been adopted by the House, they are justly held answerable for the policy of which they consent to be the instruments." The principle is the same as that which in the case of the Crown we have already considered. Obedience to wrongful

* 3 *Hans.*, cxxx. 388. † See *per* Lord Derby, 3 *Hans.*, clxiii. 719, 721.
‡ *Parl. Govt.*, 92.

commands can never be accepted as a defence either in law or in policy. If Lord North be justly blamed for his execution, in submission to the King, of a policy which he knew to be wrong, the censure which attaches to him would not be diminished if the author of that policy had been not the King but the House of Commons. The best mode of checking improper commands is to prevent their execution ; and this object is effected in our system by the difficulty of finding a ministry which will incur the responsibility of obedience.

We thus arrive at a further check. Since the Queen's Government must be carried on, those persons who have overthrown one Administration must be prepared to provide a substitute. From the nature of the case they must in doing so be subject to unsparing criticism. Thus, if the ministry be responsible, an equal responsibility rests with the Opposition. They oppose, knowing that they are liable to be required to substantiate their statements. They cannot merely harass or displace their opponents. They must take those opponents' places, and give practical effect to their doctrines. Thus, as the hope of acquiring office reduces the bitterness of opposition, so the fear of a compulsory acceptance limits its extravagance. "Those," says Earl Grey,* "who have watched the proceedings of Parliament, cannot be ignorant how many unwise votes have been prevented by a dread of the resignation of ministers, and that the most effective check on factious conduct on the part of the Opposition is the fear entertained by its leaders of driving the Government to resign on a question upon which, if they themselves should succeed to power, they would find insuperable difficulties in acting differently from their predecessors."

* *Parl. Govt.*, 93.

§ 3. The bicameral system, it has been observed,* accompanies the Anglican race like the Common Law. Not only do the Peers of the present day securely fill the places of the Mowbrays and the Bohuns, the Mortimers and the De Veres; but in every community to which our mighty mother of men has given birth the institution of the two chambers is religiously preserved. When the backwoodsmen of Oregon met to repair the continued neglect of Congress, and to establish some form of Government for themselves, they at once adopted the principle of the two Houses. Even the freed Africans brought the same principles to Liberia. In the Congress of the United States, in the Congress, while it lasted, of the Confederate States, in every state Legislature North or South, on the Atlantic, or in the far West, in every British colony which has attained to the dignity of local self-government from the St. Lawrence to the Murray, the same political organs are reproduced. The true cause of this remarkable uniformity lies deep in the original character of Anglican liberty. That liberty is essentially different from that "unity of power" to which Rome and the nations derived from Rome aspire. It implies safe guarantees of undisturbed legitimate action and efficient checks against undue interference.† But where the whole power of the state rests undivided and unmodified, whether in an individual, or in a body of men, or in the whole community, there is not liberty but absolutism.‡ The true merit, then, of the bicameral system is that by dividing a power that would otherwise have been beyond control it secures an essential guarantee for freedom. § The bicameral system.

* Lieber, *Civil Liberty*, 157. † *Ib.*, 24.
‡ Lieber, *Pol. Ethics*, 358.
§ See Guizot, *Hist. of Rep. Govt.*, 443; Mill, *Rep. Govt.*, 233.

Where there are two assemblies differently constituted, each naturally serves as a restraint upon the other. The same passions, the same interests, and the same personal influences will often possess a very different degree of weight in the respective Houses. There arises, too, an emulation of character and of talents.* Even the jealousy of one body is a safeguard against the usurpations of the other. There are other incidental advantages in this division, such as the greater opportunity for ample and deliberate discussion and the greater security against surprise or any similar stratagem. But these objects can be attained, if not so fully at least sufficiently, in a single House by the aid of proper rules of procedure. It is very doubtful whether the advantage in this respect of the two Houses would outweigh its disadvantages. For this system, like all other things, has its characteristic inconveniences. It enables a minority to defeat a majority. It often delays and sometimes altogether prevents useful reforms. It leads to conflicting claims and jealous rivalries. At best it involves double trouble and loss of time. These inconveniences are the price we pay for the security of our freedom. It is better that we should submit to a slower and less energetic political action than that we should establish absolute and irresistible authority.

In this view we can understand both why there is a duality, and why there is not a plurality, of chambers. Two chambers are found to be sufficient to attain the desired purpose. A greater number would only increase the cost without improving the result. The division of power must be secured even at some cost of efficiency ; but the amount of this cost should be reduced to its least possible limits.

The main cause of the success of this system in England

* See Bentham's *Works*, ii. 308.

is doubtless its historical development. The House of Peers was not made, but it grew. It waxed as the nation waxed ; and people were from time immemorial accustomed to see the territorial grandees in what seemed their natural position. In this way not a few of the associations and sympathies which once attached to the great Feudal Lords still linger around their less romantic representatives. Thus both the force of custom, and the traditions of ancient greatness, and a general though perhaps vague sense of present utility, combine to secure the position of the House of Lords. But this House is of purely English growth. It has no analogue in the political system of continental Europe. It has been, indeed, transplanted thither ; but it refuses to thrive out of its native soil. Even in the colonies the second chamber has never attained the dignity of its great original. There is, perhaps, no more difficult question in practical politics, or one towards the solution of which the political thinker can give less help, than that of forming in a new country an Upper House. The reason probably is that its constitution must be in a great degree determined by the circumstances of each community.

§ 4. The utility of Parliament depends upon the freedom of its action and the genuine expression of its will. But that freedom and that expression depend upon the mode of proceeding by which its will is ascertained and its action determined. The law and custom of Parliament therefore form an essential part of our political system. Unattractive and even trifling as it may at first sight appear, the code of rules which, under this title, has been spontaneously evolved is, both in its origin and its immediate and remote results, one of the most striking phenomena in our polity. It is peculiar to

Lex et Consuetudo Parliamenti.

the Anglican race. It has silently been developed to a degree of almost absolute perfection. It has become in other countries the model for the practice of legislative assemblies. It has proved at home an efficient instrument of public instruction for the transaction of the business of public meetings. There is no slight advantage in securing that the public business shall be transacted decently and in due order. But this is the least of the services of Parliamentary law. The minority is protected, and the violence or the improvidence of the majority is restrained. Every individual member and the public at large alike find in this system their appropriate security. Every member is enabled to express fully and freely his opinion on every subject with which the House has to deal. There is no room for stratagem ; there is no stifling of debate. The utmost latitude of discussion is ensured ; but, after free deliberation, the action of the majority is unimpeded. At the same time that the rights of the minority are thus protected, full consideration is secured for each measure. No important step can be taken heedlessly or upon a sudden impulse. No House of Commons could, in a fit of enthusiasm, sacrifice upon the altar of their country in a single evening their own rights and those of their constituents. It could not, like the Constituent Assembly on the famous night of the Fourth of August, abolish by acclamation the whole social structure of the country. Those rigid rules have often a very sobering effect. They give time for the fits of excitement that are incident to large assemblies to subside or to pass away. They cannot, indeed, exclude errors, but they fix the limit of error. Our deliberate judgment may be wrong, but we can hardly be guilty of rashness or improvidence.

We are now so familiar with the exercise of the *Lex et Consuetudo Parliamenti* that we fail to recognize its real

merits. In this instance, as in so many others, we neglect the marvels that are at our feet. But the unanimous testimony of the ablest writers, and the results that have attended the absence of any such system, prove the constitutional importance of this branch of our law. De Tocqueville * has pointed out the growing tendency of democracy to disregard forms and to slight their importance; and earnestly enforces the importance which, in such a condition of society, forms, as the defenders of true liberty, possess. Lieber† dwells upon Parliamentary Law as an essential guarantee of freedom, and as one of the especial glories of the Anglican race. Even the habitual wrath of Bentham‡ himself is modified when he approaches this part of our polity. The great reformer, whose denunciations are so fierce and whose language is so unmeasured on all other parts of our law, recognizes "in this bye-corner the original seed-plot of English liberty." In this department of our law, and in this alone, he confesses that "although equally disposed to have hazarded invention," he has had "nothing to do but to copy." There are few legislative assemblies in other countries that have not suffered from a want of that elementary knowledge of the procedure of public meetings with which every Englishman and every American are unconsciously familiar. Such a want has been one main obstacle to the establishment of free constitutions on the continent of Europe and in South America. In the great French Revolution the same difficulty, as I have already intimated, was keenly felt. Sir Samuel Romilly, whose liberal nature and hereditary sympathies led him to take a deep interest in that Revolution, prepared for the use of the National Assembly a statement of the rules of the House of Commons, and Mirabeau translated the work into

* *Dem. in America*, ii. 390. † *Civ. Lib.*, 153. ‡ *Works*, ii. 332.

French. That Assembly, however, neither adopted these rules nor observed any others. There was no order or regularity in their debates.* A hundred members might be seen at the same time attempting to address the House. No rule was observed in making motions. The spectators were allowed to applaud and even to hiss. The authority of the President was altogether disregarded. "Much of the violence," says Sir Samuel Romilly,† "which prevailed in the Assembly would have been allayed, and many rash measures unquestionably prevented, if their proceedings had been conducted with order and regularity. If one single rule had been adopted—namely, that every motion should be reduced into writing, in the form of a proposition, before it was put from the chair, instead of proceeding as was their constant course by first resolving the principle as they called it *(décréter le principe)* and leaving the drawing up what they had so resolved (or as they called it *la rédaction*) for a subsequent operation—it is astonishing how great an influence it would have had on their debates and on their measures. When I was afterwards present and witnessed their proceedings, I had often occasion to lament that the trouble I had taken had been of no avail."

§ 5. We have thus seen some of the principal checks which control the operation of the various powers of the state. The Crown expresses its legislative will by the advice of both Houses of Parliament, and in all other matters is enlightened and assisted by their advice. Each House of Parliament has in its system of procedure provided means for arriving, on the fullest information and the most mature reflection, at the best conclusion that it is in its power to form. These Houses

The influence of Courts of Law.

* Carlyle, *Fr. Rev.*, i. 265. † *Life*, i. 75.

are further restrained at the present day by the knowledge that their advice may lead to the displacement of the principal servants of the Crown, and to the demand upon them by the Crown for a new Administration and for the practical execution of their own advice. As between themselves, the two Houses have a sufficient guarantee in the necessity for their concurrence. Each House can protect itself by refusing its assent to the proposals of the other. The Commons may reject all money bills with which the Lords have interfered. The Lords may refuse to consider any bill which includes a tack. We have already seen how, partly by the influence of the Crown, partly by the good sense and forbearance of the disputants themselves, and chiefly by the weight of public opinion and the exigencies of public business, such disputes are compromised or otherwise determined. But the guarantee itself implies something more. In this case, as in almost every other case in our political reasonings, there is a sort of universal postulate. As in all our reasonings on physical subjects we assume the continuance of the existing order of the universe, so in political reasonings we assume the continued supremacy of the law. Happy, indeed, it is for us that long familiarity has enabled us to assume as a matter too obvious for statement such a proposition. Yet there have been times in our own history when a King meditated to govern at one time without a Parliament, at another time with a mutilated Parliament;* and when on the other side the House of Commons told the House of Lords that, if their Lordships would not concur in the necessary measures, the Commons would govern the country without the aid of the other House.† Nor even in our own time has the assertion of principles been unknown which,

* See Forster's *Hist. Essays*, i. 110.

† Guizot, *Hist. of Eng. Rev.*, 122.

although, doubtless, not intended to exempt from all legal restraint one branch of the Legislature, were inconsistent with that general subordination which is the characteristic of our polity.

The Queen in Parliament exercises the supreme power or sovereignty of the United Kingdom. That great court can make new laws or abolish old laws, can superintend the administration of justice, and can remove, or, if need be, punish, the officers who administer it. But this authority rests with the Queen in Parliament ; it is a power which must be exercised by the whole body, and not by one part, or even by two parts of it. The alteration of the law proceeds from the Queen, but even in her case it must be such an alteration as the law recognizes. Much less, therefore, will the law recognize any attempted change of its provisions by any subject or any body of subjects, whatever may be their position or their influence. The law has, indeed, assigned to Parliament for the better performance of its functions certain great powers, privileges and immunities. These special rights are included in the *Lex et consuetudo Parliamenti*, and form part of our general law of status. A member of Parliament, for example, cannot be called in question for anything said by him in his place in Parliament, nor can he be arrested in any civil proceeding. But these powers must be exercised strictly within the limits of law ; and a member of Parliament is answerable, like any other person, for his language outside Parliament, and even for the publication in the usual manner of a speech delivered by him in Parliament. Nor can either House by its resolution* create any new privilege. Much less can it impose any disability upon any person not one of its members, or by any claim to special jurisdiction

* See May's *Parl. Practice* (6th ed.), 66.

deprive him of his remedy at law. Nor will the command of either House, except in such cases as are distinctly recognized by law, furnish a justification to any officer for any act or forbearance which without such command would have been illegal, or in any way shelter him from the ordinary consequences of his conduct. If the irregular command of the Queen be no excuse for an act otherwise unjustifiable, the irregular command of her council, or of any part of it, is not entitled to any greater deference.

It is needless to discuss at length such familiar cases as those of *Ashby v. White* and *Stockdale v. Hansard*. But the character of our Common Law, and the analogies which it affords, seem to me conclusive as to the restraining and protective power of the courts. In *Ashby v. White** a remedy was given for a wrong done to an elector by the rejection of his vote, although the House of Commons claimed exclusive jurisdiction in electoral matters. In *Stockdale v. Hansard*† a remedy was given for a wrong done in pursuance of the very order of the House. In both cases the House of Commons passed very strong resolutions in support of their alleged privileges, and even attempted to enforce their authority against the officers who carried out the judgment of the court. The precedent, however, of 1840 points to the true solution of the difficulty. Parliament always has the remedy in its own hands. It can, as it then did, pass an Act, if it think proper to do so, to alter the law. But while the law remains, the courts must administer it; and all persons, whether the Queen or the House of Commons or the humblest of Her Majesty's subjects, must obey it.

§. 6. We possess yet another and more comprehensive security for the efficient working of the state. This

* Lord Raymond, 938. † 9 Ad. & El., 1.

guarantee consists in the publicity of the exercise of public functions. Public business must be transacted in public. What touches all should be approved by all. What should be approved by all must be known to all. In every branch, therefore, of our political system, in the administration of the law, in the transaction of affairs of state, in legislation or in the general supervision of Parliament, in the mode of elections, and in the exercise of the electoral franchise, our proceedings are notorious. Secrecy, indeed, is abhorrent to our Constitution. The political business of England is conducted, not obscurely or in a corner, but in the light of day and before the world.

The publicity of public functions.

The importance which the law attaches to publicity is perhaps best seen in judicial proceedings. To such an extent is this principle there carried that its requirements prevail over those even of public decency. Every criminal case, however loathsome, is investigated in open court. We cannot persuade ourselves, even in extreme cases, to close the doors of that sorrowful tribunal where the sins and the follies of married life are remorselessly exposed. "All causes," says Lord Coke,* "ought to be heard, ordered and determined before the Judges of the King's Courts openly in the King's Courts, whither all persons may resort, and in no chambers or other private places; for the Judges are not Judges of Chambers but of Courts; and therefore in open court, where the parties, councell, and attorneys attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers or other private places, where a man may lose his cause or receive great prejudice or delay in his absence for want of defense. Nay, that Judge that ordereth or ruleth a cause in his chamber,

* 2 *Inst.*, 103.

though his order or rule be just, yet offendeth he the law (as here it appeareth) because he doth it not in court." It is the custom, too, of all our courts to declare in all judgments of importance the reasons upon which their conclusions are founded. It was rightly regarded as one of the worst innovations of the dark period of the later Stuarts that the Judges began to discontinue this practice, and simply delivered their judgments without any statement of their reasons. In the House of Lords and in the Courts of Law and of Equity, if the court be divided in opinion, all the Judges, both those who concur in the judgment and those who differ from it, state separately the grounds of their respective opinions. In the Judicial Committee of the Privy Council this practice is not observed, but some member of the committee always states the reasons of the decision, and these reasons are usually set forth in a written judgment. These judgments of the several courts are published in the various books of reports, and form the evidences of our Common Law in its present form and of the true meaning of our statutes. Thus every judicial act is performed not only in view of ulterior responsibility, but in the face of an audience interested, critical, acute, and habitually engaged in the transaction of business with the judge. The power of these influences, both in developing the character of the future judge and in determining the apparently unrestricted limits of his judicial discretion, is readily appreciated by the legal profession ; but can hardly be described to those who have never felt its stringency.

Our earlier Parliamentary history contains few traces of any attempt to obtain an accurate knowledge of the proceedings of the Administration. Such things were regarded as too high for ordinary persons ; and information about them was seldom asked, and still more seldom given.

With such matters of state the Tudors and the Stuarts thought that Parliament ought not, except on express invitation, to interfere; and if they were obliged sometimes to submit to such interference, they did not care to encourage it by giving more information than they could avoid. After the Revolution, the increased power of the House of Commons brought with it the necessity of ampler ministerial explanations. The House assumed to criticise every act of administration; and proper information as to these acts, their causes and their consequences, was essential for the performance of this function. The full communication of all public affairs to Parliament is obviously incidental to Parliamentary supervision. Either House, therefore, can now obtain information on any subject, whether domestic or foreign, that it may require, in some cases by its own order, in others by an address to the Crown. No such address is refused unless the production of the papers desired would be manifestly detrimental to the public service. The papers thus obtained are printed and circulated among the members of Parliament, and through them were formerly accessible to the public. In 1835 the House of Commons directed that all its papers should be sold at a cheap rate. Thus all the information which Parliament possesses in relation to the affairs of state is now equally at the command of the general public. How ample that information is, how instructive to the public, and how conducive both to good legislation and good administration, I need not remark. Such, indeed, are its magnitude and its importance that it is difficult for us to understand how in its absence our ancestors could have even attempted to transact their public business.

The sources of its information are not the only matters which Parliament has of late years submitted to public

criticism. Its own proceedings, not less than those of the Administration, are now practically, if not quite in theory, public. This publicity, however, is of recent date. In earlier times the Commons, for their own safety, were careful to deliberate with closed doors, and under strict conditions of secrecy. Notwithstanding these precautions, free speech was far from safe. A troublesome leader of Opposition might reasonably expect to be called before the Council, interrogated, reprimanded, and perhaps committed to the Tower. The practice continued after the reason for it had ceased ; and, as usually happens in such cases, its results were very different from those which were originally contemplated. "The rules* which had been originally designed to secure faithful representatives against the displeasure of the Sovereign now operated to secure unfaithful representatives against the displeasure of the people, and proved much more effectual for the latter end than they had ever been for the former." The new interest in public affairs which followed the Revolution, and the exigencies of the newspapers just struggling into existence, led to some attempt at a publication of debates. This attempt was peremptorily repressed ; and for eighty years afterwards† violent resolutions were from time to time passed against the Press, and were rigorously enforced. But the public desired the news, and those who saw in the supply of news a legitimate source of gain were determined to satisfy the public. The newspapers had become towards the end of the reign of Anne not mere news-letters but regular political journals. It was their business to obtain correct reports of Parliamentary proceedings, and they were not deterred by threats or even by occasional punishment. Various well-known

* Macaulay's *Hist. of Eng.*, iii. 544.

† May's *Const. Hist.*, i. 415.

expedients were adopted to evade the prohibition. At length, in that unhonoured Parliament which sought in its persecution of Wilkes to set Privilege above Law, the long impending contest with the Press actually arrived. Colonel Onslow, a member of the House of Commons, complained that he had been misrepresented by the reporters, and moved that the resolutions against publication of debates be read. The newspapers announced in no very respectful language their intention to persevere. The irate senator insisted that the printers should be called to the bar. The House, although not without reluctance, supported its member. The printers were summoned, but refused to appear. The exertions of the Sergeant-at-Arms to enforce their attendance were ineffectual. On an address of the House a reward was offered for the apprehension of the offenders. One of them was collusively arrested, and brought before an alderman. The alderman was the famous John Wilkes. That arch-demagogue, like the Anarch old, by deciding, more embroiled the fray. He released the prisoner, bound over his captor to answer a charge for assault and false imprisonment, and gave notice to the Secretary of State of what he had done. Colonel Onslow and his supporters now resolved upon a crusade against the whole newspaper press. Six leading printers were ordered to attend. Lord North made the matter a Government question. The King advised that the matter should be transferred to the Lords, because, as His Majesty observed, they could "fine as well as imprison the miscreants." The Opposition remonstrated in vain. The printers were summoned, and reprimanded on their knees. One only, Mr. Millar, the printer of the *London Evening Post*, was contumacious. The Sergeant-at-Arms sent his messenger to arrest him. Millar captured his captor, and brought him before the City Bench. The Lord Mayor and

Alderman Oliver, themselves members of Parliament, committed for trial the official ; and were in their turn sent to the Tower by the enraged Commons, whose anger led them to other and less excusable measures. The magistrates failed in obtaining their release on a *habeas corpus*, and endured a triumphal imprisonment until the end of the session. No further measures, however, were taken against the printers ; and from that day forth the proceedings of Parliament have been regularly reported in the public journals. "Thus," says Mr. Massey,* "a quarrel, originally provoked by a demagogue for the purpose of feeding his gainful popularity, and to which the Commons had been in the first instance committed by the levity of one of their most insignificant members, resulted in an event which must ever be referred to as a most important epoch in the constitutional and political history of the nation."

In the conduct of elections, too, our Constitution has always observed the same publicity. The early writs are precise in their directions that the elections shall be held *in pleno comitatu*, at the meeting of the whole county assembled in open court. It was intended not only that every elector should have an opportunity of voting, but that he should vote along with his neighbours and in their presence. The reason for this publicity is found in the view in which our law has always regarded the electoral franchise. That franchise is not, as many persons contend, either a right or a trust. It is a duty. The nature of a duty is independent of the motives for its performance. A duty may sometimes be burthensome in a greater degree, sometimes in a less degree ; sometimes it may even be advantageous. In those cases where duties have correlative

* *Hist. of Eng.*, ii. 124.

rights, the same thing is, according to its aspect, a right or a duty. But an absolute duty—that is, a duty which does not correlate a right—sometimes, if its exercise be beneficial, simulates the form of a right or privilege. Our attention is, in such circumstances, naturally directed to the inducement to obey, rather than to the actual command, and we thus confuse the motives to the act with the character of the act itself. That the electoral franchise is not a right appears if we apply to it that definition of right which Mr. Austin* regards as the nearest to the truth, "the capacity or power of exacting from another acts or forbearances." The proposition that this franchise is a trust seems to be merely metaphorical. In its literal meaning it has no warrant whatever; and it probably was intended to convey, although in an inaccurate form, the notion that its exercise was a public duty. That it really is a public duty its history sufficiently indicates. It was originally an obligation incident to the acknowledged obligation of suit and service in the County Court. It was for many years regarded as very onerous, and frequent attempts were made either to obtain exemption from it or to evade it. The motives to perform this duty, and consequently the alacrity with which it is performed, have indeed undergone a change; but the duty itself in contemplation of law remains in its original state. Nor is this phenomenon unique in our jurisprudence. The law imposes upon certain specified classes of persons the duty of serving as jurors, or in municipal offices. Many persons regard this duty as burthensome, and are willing even to submit to punishment rather than discharge it. But to many persons the possession of municipal office is an object of intense ambition; and not a few regard the position of special juror as an honourable distinction, and

* *Jurisprudence*, ii. 63. See the author's *Legal Duties and Rights*, 145.

would, if they were permitted, gladly pay a considerable sum for admission to the special jury list.

Apart from any reference to our antecedent condition, publicity in the exercise of the franchise may be supported on the ground of expediency. "It is a very superficial view," says Mr. Mill,* "of the utility of public opinion to suppose that it does good only when it succeeds in enforcing a servile conformity to itself. To be under the eyes of others—to have to defend oneself to others—is never more important than to those who act in opposition to the opinion of others, for it obliges them to have sure ground of their own. Nothing has so steadying an influence as working against pressure. Unless when under the temporary sway of passionate excitement, no one will do that which he expects to be greatly blamed for doing unless from a preconceived and fixed purpose of his own; which is always evidence of a thoughtful and deliberate character, and, except in radically bad men, generally proceeds from sincere and strong personal convictions. Even the bare fact of having to give an account of their conduct is a powerful inducement to adhere to conduct of which, at least, some decent account can be given. If anyone thinks that the mere obligation of preserving decency is not a very considerable check on the abuse of power, he has never had his attention called to the conduct of those who do not feel under the necessity of observing that restraint. Publicity is inappreciable even when it does no more than prevent that which can by no possibility be plausibly defended—than compel deliberation, and force everyone to determine before he acts what he shall say if called to account for his actions."

We can thus appreciate the true character of the ballot.

* *Rep. Govt.*, 200.

The expression "vote by ballot" is used to imply two distinct ideas. One of these is voting by a written document, and not orally; the other is secret voting. The former is a mere question of convenient arrangement; the latter involves a political principle. Written voting is a useful contrivance for taking the votes, and conduces, especially in times of excitement, to the preservation of the peace and to good order in the polling. But it by no means implies secrecy as to the mode in which the vote is given. The "secrecy of the ballot" consists not in the temporary concealment of the vote, but in its permanent concealment from all but the presiding officials; and any disclosure by these persons of their knowledge is punished as a misdemeanour. This arrangement fails to accomplish any useful end, while it abandons a fundamental guarantee of political action. Secret voting implies a state of society where intimidation, or some other form of undue influence, is habitually dominant. For such a condition secret voting can be, at best, only a palliative. The true remedy for the disease lies much deeper. The causes which have produced that unhealthy tendency must, if we desire a permanent cure, be removed. In the absence, however, of any such disturbing force, secret voting seems to have no compensating advantage whatever. In such circumstances, those who have convictions can express them freely. Those who have not convictions are relieved from a controlling influence which is, in their case, peculiarly needed.

The right of political discussion.

§ 7. The publicity of the exercise of public functions would lose the greatest part of its influence if means were not provided for the full and free formation and expression of public opinion. These two subjects are intimately connected and mutually

re-act. It is only in a community habituated to the exercise of public functions, and trained by the habits of its daily life to an interest in public affairs, that any just political opinions can be formed. It is only in a community which possesses an enlightened public opinion that political powers can be wisely exercised. The freedom of individual speech and action is the foundation of good government, as well as one of its leading objects. It is our peculiar boast—at once the cause of our good government and its surest sign—that, whether girt with foes or girt with friends, a man may speak the thing he will. This unimpeded exercise of all the faculties of each individual is the true end of government ;* and the more nearly this object is attained, the better, at the same time, our method of government tends to become. But the administration of public affairs implies co-operation. Where others are concerned equally with ourselves—where they have the like rights and duties and powers—we can influence public affairs only by influencing the wills of our associates, by confirming the purposes of those who think with us, and by converting, or in some way persuading, those who think differently. There are accordingly three leading forms under which the action of the constituent bodies upon the governing bodies is manifested. These are the Right of Public Meeting, the Right of Petition, and the Right of Association.

The Right of Meeting to which I now refer relates to voluntary meetings for the discussion of political subjects ; and is distinct from the duty of attending those meetings which the law once recognized for the transaction of public business, but which have more or less fallen into disuse. It is needless to treat at any length of such voluntary meetings.

* See *Plutology*, 411.

They are familiar to us all. But, familiar though it now be, this class of meeting is of very recent origin. The earliest instance of the kind occurred less than an hundred years ago. It was the famous meeting of the freeholders of Middlesex, and afterwards of Yorkshire, who assembled to protest against the proceedings of the House of Commons in expelling Mr. Wilkes from the House although he was not subject to any legal disqualification, in refusing to admit him after repeated re-elections, and finally in declaring duly elected a candidate for whom but a small minority of the electors had voted. The Right to Petition the Crown is of older date. Every subject is entitled to lay his grievances before the Throne; and this right was expressly recognized at the Revolution. The Right to Petition Parliament is on a different footing. Petitions for the redress of local and personal grievances had always been admitted, and received relief similar to that which at the present day Courts of Equity and Private Acts afford. But on matters of a public nature, and not directly affecting individual interests, the right of petition was not generally recognized, and was seldom claimed. During the troubled time of the Long Parliament petitions expressing sentiments favourable to the House of Commons were graciously received. But for more than a century after that period the number of political petitions was small, and their reception was seldom encouraging. Even after the commencement of public meetings the progress, although distinct, was slow. Not more than forty petitions were presented during the excitement of Wilkes' case. In 1782 about fifty petitions were presented praying for Parliamentary reform. But in 1787 the agitation against the slave trade was conducted by means of petitions; and the success which attended these tactics established the utility of this new political force. During the

remainder of the reign of George the Third petitions were presented, though not in great numbers, on many public questions. The development of the modern practice dates from the latter part of the reign of George the Fourth. The first great impulse seems to have proceeded from religious bodies agitating first for the abolition of slavery, and afterwards for the removal or the continuance of religious disabilities. The great political changes of the present and the preceding reign have been freely made the subject of petition. During the first twenty years of Her Majesty's reign the House of Commons received on an average about 13,000 petitions in the year.* On a single day (March 28) in 1860 nearly 4,000 petitions were presented on the subject of church rates.

The same period and the same causes which thus produced political meetings and Parliamentary petitions gave rise also to that organization from which those meetings and those petitions derive their greatest weight. The Right of Association stands on the same basis as that of free thought or of free speech. The opinions which men individually hold they may combine to support. The power of co-operation, so conspicuous in industrial proceedings, is not without its weight when directed to political purposes. The old poet made no fanciful remark when he sung of the increase of strength that mere combination gives to men, even though they be very weak.† Association, too, produces other effects. An opinion as represented by a society acquires a precise and definite form. The members of the society are distinctly pledged to the maintenance of their particular views, and strengthen and encourage each other by their sympathy and example.‡ The fitful

* May, *Const. Hist.*, i. 442.

† Σημεῖον δ' ἀνεπὴ πᾶν ἀνδρῶν καὶ πόλις ἀρχαῖον.—*Ilias*, xiii. 237.

‡ De Tocqueville, *Democ. in America*, i. 117.

enthusiasm of the individual is matured into a steady settled purpose. There is no mistake about the object, no divergence of views as to its attainment. A united action, when the course of action has been settled, is required from all. While its own ranks are thus closed, the association, by its example and its authority, illustrates and extends its opinions, and attracts and assimilates new supporters. The first association of that kind with which we are now familiar* appears to have been the "Society for Supporting the Bill of Rights," which arose out of the great movement of 1769. The commencement once made, the progress was rapid. The Government looked with no little disfavour on such combinations; and the interference of Parliament was more than once invoked. But the power of the instrument, when its use was understood, was too great to be disregarded. To it we owe, perhaps, some serious alarms, but also not a few of our greatest modern reforms. If the Protestant Association over which Lord George Gordon presided, or the Repeal Association of later times, threatened the peace of the country, the Anti-Slavery Association, the Catholic Association, the Reform League, the Anti-Corn League, are names that recall successes on which it is superfluous to dilate, and memories which men will not willingly let die.

The freedom of the Press.

§ 8. "The great preservation of the equilibrium in our Government," says Mr. Hallam,† "is the public voice of a reflecting people averse to manifest innovation and soon offended by the intemperance of factions." Some of the means by which this public voice forms its sentiments and finds its utterances I have already mentioned. One, and that in modern times

* May, *Const. Hist.*, ii. 121. † *Const. Hist.*, iii. 141.

the most potent of all, requires separate notice. The right of the written communication of thought and sentiment belongs to that great class of primary rights which includes the right of utterance and the right of association. Writing is only an extension of speech, and printing is only an extension of writing. Whatever, therefore, a man may lawfully say, he ought to be able to the same extent lawfully to print and to distribute. Such a power is needed for the unimpeded course of social development. It is a natural part of that development that a special class should arise for the supply of information and for commenting upon and illustrating the facts that they record. This class, so far as it is an exponent of opinion, can only, on the whole, represent the opinions from which it derives its support. It supplies material for the formation of public opinion; and to some extent, and within certain limits, it leads and directs that opinion. But it can never with impunity either go far in advance or remain far behind. The Press is not an original motive power in society. It merely applies, under favourable conditions, forces already existing. It is analogous to the lever rather than to steam. But its influence, even on this view, is very great. "It is the power," says De Tocqueville,* writing of the United States, "which impels the circulation of political life through all the districts of that vast territory. Its eye is constantly open to detect the secret springs of political designs, and to summon the leaders of all parties to the bar of public opinion. It rallies the interest of the community round certain principles, and it draws up the creed which factions adopt; for it affords a means of intercourse between parties, which hear and which address each other without ever having been in immediate contact. When a great

* *Democ. in Amer.*, i. 202.

number of the organs of the Press adopt the same line of conduct, their influence becomes irresistible; and public opinion, when it is perpetually assailed from the same side, eventually yields to the attack. In the United States each separate journal exercises but little authority; but the power of the periodical Press is only second to that of the people."

The efficient action of the Press depends upon two conditions. The one is the absence of any restriction upon its actual utterances; the other is the limit within which such utterances are confined by law. In other words the freedom of the Press includes both the absence of any licensing system and the positive provision of the law of libel. On the subject of unlicensed printing nothing now needs be said among us. The preventive action of the state upon men's writings is one out of the innumerable examples with which our history abounds of the evils that spring from well-meant interference with individual freedom. It commenced with the laudable purpose of securing the public from the inaccuracy of copyists.* It was continued as a security against the dangers of heresy and of sedition. But truth has no cause to fear discussion; nor did the time need such aid as the law could give, or such poor defenders as the Censors. How long the licensing system continued, what mischiefs it wrought, and how and by what arguments it fell, I shall not attempt to describe. Its history is recorded in the pages of Milton and of Macaulay. While the Censor represented the kindly care of a paternal Government, the law of libel was the instrument of punishment in the hands of a vindictive Government. This branch of our law involves two questions: the first, what writings shall be deemed libellous; the second, with whom

* Hallam, *Middle Ages*, iii. 458.

the decision of the libellous character of the particular writing is to rest. Both before and after the Revolution* it was held that in a prosecution for libel it was not material whether the facts were true or false, and that therefore no evidence of their truth could be admitted. It was also held that the character of public officers required especial protection ; and that the offence was in contemplation of law greater when the libel was pointed at persons in a public capacity, because, as it was said, it is a reproach to the Sovereign to employ corrupt and incapable persons. It was further held that the construction of a libel, like that of any other writing, was a matter of law and not of fact ; that the question of criminality therefore rested with the court ; and that nothing consequently was left for the jury in such cases except to ascertain the fact of publication and the innuendoes or meanings ascribed to particular words. After a long contest, in which Lord Erskine bore the most distinguished part, an Act† was passed, by the exertions of Mr. Fox, and the co-operation of Mr. Pitt, which provided that the jury in giving its verdict should be entitled to take into consideration the character and tendency of the writing alleged to be libellous. More than half a century afterwards a further Act‡ was passed, which permitted the defendant to plead that the alleged libel was true, and that its publication was for the public advantage.

If the question be considered on the grounds of legal analogy, it is probable that the law as laid down by Lord Mansfield and the other judges of the last century was correct. But a political libel is punished less as an act of immorality than as an act of insubordination. Since, therefore, the acts of those who make or who administer

* See Lord Campbell, *Lives of the Chief Justices*, ii. 147, 208.
† 32 Geo. iii. c. 60. ‡ 6 and 7 Vict. c. 96.

the law are the subject of discussion, these acts must be amenable to criticism ; and this criticism, within reasonable limits, must be protected. Thus, until the present legislation was adopted, the political guarantee which consists in the free expression of opinion was incomplete. As it now stands, the law implies no inflexible rule to cases of libel ; but requires the jury, and not any permanent public officer, to find in each particular case whether the limits of fair comment have or have not been exceeded. Since Lord Campbell's Act, and, indeed, in practice for several years before its enactment,* the widest latitude has been given to public criticism. Even in judicial proceedings the same principle is recognized ; and an amount of criticism is endured which in former times would have been peremptorily suppressed. Yet the consequences of this emancipation of the Press are very different from what two centuries ago could have been predicted. The statesmen of the Revolution feared to dispense with the licenser. Holt and Raymond thought that the Government could not be carried on if it were subject to the free criticism of the Press. George the Third was especially severe towards "the miscreants" who assailed his policy ; and both his sons† continually urged their ministers to commence prosecutions for political libels. But at no other time and in no other place than in England since the complete freedom of the Press has been established has Government been conducted with greater efficiency, or has the tone of the Press been more elevated or its criticism more moderate and fair. The political writing of the present day no more resembles the political writing of the Regency‡ than our

* May, *Const. Hist.*, ii. 217.

† For Geo. IV. see *Courts and Cabinets of Geo. IV.*, i. 107 ; for Wm. IV. see Roebuck's *Hist. of the Whig Ministry*, ii. 220, *note.*

‡ See May, *Const. Hist.*, ii. 206.

general literature resembles the literature of the Restoration. The political purification of the Press is due to the same cause as that to which its moral purification is due. That cause was not the care of the Censor, or the terrors of the Attorney-General. It was "the opinion of the great body of educated Englishmen, before whom good and evil were set, and who were left free to make their choice."*

A libel considered as a crime has been described† as anything for having written which a jury thinks that a man ought to be punished. But in this description an important case is omitted. A jury is not the only body which such a description should include. In all matters which concern its own body or its members, each House of Parliament decides not only what writings ought to be punished, but how it will punish them. The conduct of the representatives of the people might, indeed, be supposed to be in a peculiar degree the subject of public comment, and such comment might seem in a peculiar degree entitled to the protection of the law. The fact, however, is otherwise. The House makes the charge, hears and determines the case, assesses the punishment, and executes the judgment. In a libel upon a member of Parliament when the case is one of privilege, and in no other case, the defendant is not allowed to plead the truth of the facts,‡ or to obtain the verdict of a jury. The House pronounces the writing a libel, and forthwith proceeds to punishment. In England, happily, under the improved state of public opinion that now prevails, this anomalous power has of late years been rarely exercised, and still more rarely abused. But the same forbearance is

* Macaulay, *Hist. of Eng.*, iv. 607.

† *R. v. Cutbill*, 27 *State Trials*, 642.

‡ But see the case of Mr. Washington Wilkes, 3 *Hans.*, cl. 1,067.

not always shown in colonial legislatures into which all the privileges of the House of Commons have in some instances been introduced. These bodies seem disposed to regard each member as entitled to demand as of right the protection of the House against any attack that may be made upon him; and when their assistance is requested, they incline, although sometimes reluctantly, to support their colleague. It is indeed just that members of Parliament should be protected from calumny in the exercise of their public duty, and that they should not be compelled at their own expense to vindicate their characters from the unscrupulous attacks to which their public duty may expose them. But other and less violent means exist for attaining this object. The House can always direct a prosecution by the Attorney-General. If this proceeding were adopted, cases of Parliamentary libels would, without any inconvenience to the person injured, come within the general law of the land; and it would probably be soon found that a single convicted misdemeanant would more effectually restrain the licence of the Press than a dozen martyrs of Privilege.

APPENDIX.

In this appendix I reprint, although not without hesitation, four documents which, since the publication of the first edition of this book, were written by me for temporary purposes. The first was a statement adopted on the 21st of November, 1878, by the Legislative Council, for the information of the Secretary of State, at a time when grave differences, now happily removed, had arisen between that body and the Legislative Assembly, and when an "Embassy" was about to proceed to London in order to complain of the conduct of the Council, and to invite, unsuccessfully as it proved, Imperial interference. The second was a lecture delivered in a period of much political agitation, on the 26th of February, 1879, at Geelong. The third was a report of the Committee of Elections and Qualifications of the Legislative Council, involving a point of some interest in election law. The fourth was a memorandum, written for the use of members of a Select Committee of the Legislative Council, upon the construction of certain sections of our Constitution Act, with special reference to the question whether money clauses incidentally included in bills whose primary object is some purpose other than that of finance come within the restrictions which are imposed upon the Council in respect to bills whose primary object is the appropriation of revenue or the imposition of taxation.

I.—STATEMENT

EMBODYING THE CIRCUMSTANCES UNDER WHICH DIFFERENCES HAVE ARISEN BETWEEN THE HOUSES OF LEGISLATURE ON THE QUESTION OF CONSTITUTIONAL REFORM.

(*Adopted by the Legislative Council, 21st November*, 1878.)

1. In the course of the present session two bills, copies of which are hereto appended, purporting, the one to alter the Constitution of the Legislative Council, the other to amend the Constitution Act, were originated in this House, and were passed by it. In the Legislative Assembly, although arrangements with a private member had been made for their reception, the Chief Secretary was so good as to undertake, though unasked, their charge. On his motion they were read a first time, and their second reading was made an order of the day for that day fortnight. No further proceedings appear to have been taken respecting them. In this same session a bill, with the short title "The Constitution Act Amendment Act, 1878," a copy of which is hereto appended, was sent by the Legislative Assembly to this House. The character of this measure was such that no member of the Council was willing to take even formal charge of it, much less to move its second reading. The Postmaster-General, who represented the ministry in the Council, had, previous to its introduction, resigned his office rather than accept its advocacy. At the request of the Chief Secretary, a prominent member of the Council, as a matter of courtesy, moved the first reading. But as no member could be found who was willing to give any further assistance, the bill necessarily fell to the ground. In these circumstances the Chief Secretary requested a conference between representatives of the two Houses upon the subject of the reform of the Constitution as discussed by both Houses in the present session. To this request the Council acceded, and the conference took place. At this conference, of the representatives at which the reports are hereto appended, it was insisted, on behalf of the Assembly—first, that the Council should in no circumstances reject an Appropriation Bill; and second, that all other bills passed by the Assembly and rejected by the Council should, after a certain interval, notwithstanding that rejection, become law. The representatives of the Council declined to acknowledge any legislative inferiority of this House, or in any way to

Appendix A.

Statement of facts.

Appendix B.

Appendix C.

compromise its independence. They made certain counter proposals, which the representatives of the Assembly declined to entertain, and the conference terminated without obtaining any basis for negotiations. It has been publicly announced that the Chief Secretary and other representatives of the Assembly are about to visit England for the purpose of requesting the assistance of Her Majesty's Government to procure an Act of the Imperial Parliament for the alteration of our Constitution in the direction that they wish. We do not entertain the notion that any representations made through a delegation from one House of this Legislature, and that House* divided in opinion as to the propriety of such an application, will move the Imperial Government to initiate such a measure. Our Constitution Act has provided all necessary means for making such modifications in our Constitution as experience may suggest ; and it is a maxim† which the Imperial Government has long and scrupulously observed, that "Parliamentary legislation on any subject of exclusively internal concern to any British colony possessing a Representative Assembly is unconstitutional." But as one of the Houses of Legislature of a colony proud of being an integral portion of the Empire, and knowing that the heart of the Empire is in sympathy with its remotest members, we desire to place upon record, for the information of Her Majesty's Government, our views respecting recent events in this country.

2. Under the first section of the Constitution Act, Her Majesty, with the advice and consent of the Council and the Assembly, has power to make laws in and for Victoria in all cases whatsoever. This general power is by subsequent sections limited in various ways. Of those limiting provisions which relate to the forms of legislation, the only section which affects the relation of the two Houses is the 56th. That section deals with two classes of bills—those for appropriating revenue, and those for imposing taxation. With respect to such bills it contains two enactments —first, that they shall originate in the Assembly ; and second, that they shall not be altered in the Council. The section is, as regards the Council, restrictive, and not enabling ; and, therefore, the general power of withholding its assent, which under the first section the Council possesses, is not taken away. But *ex abundanti cautela*, the 56th section expressly provides that the Council, although it may not alter, may reject bills of these two exceptional classes. From the commencement of the New Constitution in 1856 until 1865 the two Houses worked together without any serious disagreement. In the latter year, however, there was a vehement agitation for a change in

Previous disputes between the two Houses.

* Out of a House of 86 members the majority was 45 to 32.

† See May's *Const. Hist.*, ii. 571.

the financial policy of the country. For the purpose of ensuring the acceptance by the Council of a protectionist tariff, the Tariff Bill was first introduced to the Council in the form of a tack to the Appropriation Bill. The Council rejected the composite measure, on the ground that it was contrary to Parliamentary law. Ultimately the bills were severed, and were dealt with in a separate form. The next serious dispute occurred in 1867, when a grant of £20,000 to the wife of the late Governor, Sir Charles Darling, was included in the Appropriation Bill, although the Council had previously expressed, on grounds of public policy, its grave disapprobation of the vote. In two successive sessions the Appropriation Bill was on this account laid aside. After much difficulty the matter was arranged ; the grant was withdrawn from the Appropriation Bill ; and it was in an altered state of circumstances passed in a separate bill. The third dispute of this kind occurred in the end of 1877. The Act under which members of Parliament are paid for their services was then about to expire, and a bill for its continuance was sent by the Assembly to the Council. But the Council had notice that, in anticipation of its rejection of this bill, provision for the continuation of the usual payment had been made in the estimates for the year. The Council, therefore, declined to consider the bill until the threat implied by the vote in the estimates was withdrawn. The Appropriation Bill, however, was passed by the Assembly containing the objectionable grant, and was consequently laid aside by the Council. Ultimately, although not without proceedings more violent and more deplorable than those that had taken place on former occasions, this dispute was also arranged : a new Appropriation Bill without the offensive clause was introduced, and the Payment of Members Bill during the present Parliament became law.

3. Two causes of complaint have been alleged against the Council. One is that it has unreasonably obstructed general legislation ; the other is that it has improperly rejected Appropriation Bills. In reply to the first assertion, it may be observed that the number of the Acts of the Parliament of Victoria now exceeds 600, and that this amount of legislative activity is not consistent with any wilful obstruction to legislation. But it may be alleged, without danger of truthful contradiction, that not one single case can be shown of unreasonable opposition by the Council to any measure. On the contrary, the Council has on many occasions waived its well-founded objections, and has passed bills contrary to its own wishes, because the state of public opinion at the time seemed to require the sacrifice. It has thus surrendered free-trade. It has accepted manhood suffrage. It has conceded the abolition of

Alleged obstruction by Council to general legislation.

state aid to religion. It has permitted the sacrifice of that great public estate with which Her Majesty's bounty had endowed the colony. It has allowed a partial and unjust land tax to be imposed upon one section of its own constituents. On one important subject only, that of mining on private property, has it prevented the legislation that was proposed to it. On several occasions the Council has happily been able to protect the public from Mining Bills to the principles of which serious objections existed. In relation to this kind of mining, much difficulty was at one time felt, because legal opinion was divided respecting the ownership of gold in land sold by the Crown. As soon as this question was finally settled by the Judicial Committee of the Privy Council, the Council proceeded to deal with the whole subject. It has twice sent to the Legislative Assembly a comprehensive bill, which, although there is reason to suppose that it is acceptable to the mining interest throughout the country, has not had the good fortune of attracting the notice of the Assembly.

4. With regard to the rejection of Appropriation Bills, the brief statement already made shows that the disputes on this matter were not due to any attempt by the Council to assume any control over the ordinary financial arrangements of the year, but that they arose from the abuse by the Legislative Assembly of its legitimate financial powers for the purpose of carrying doubtful political measures on which it was at the time intent. It is true that from the nature of the case the odium of the rejection of the Appropriation Bill has been thrown upon the Council. Yet in every war the blame justly rests not with the party who strikes the first blow, but with the party who renders that blow necessary. It is unreasonable to blame the Council for protecting itself by the means which the law indicates, and which were the only means in its power. The true aggressors were those who, with a full knowledge of the facts, and with the undisguised intent to embarrass the Council, forced upon it, sorely against its will, this most inconvenient remedy. The constitutional remedy which each branch of the Legislature possesses against the undue encroachment of any other branch is its power of refusal. In all ordinary legislation this power is sufficient. Legislation which involves a change in the law can always wait. However desirable any reform may seem, the continued opposition of one legislative chamber is, in ordinary circumstances, conclusive proof that the country is not yet ripe for the change. In course of time either the opposition is overcome, or concessions are made by which it is disarmed. But the Appropriation Act differs from ordinary legislation. It cannot wait. It is rather in the nature of administration than of an alteration in the law. Consequently, the remedy which

Alleged improper rejection of Appropriation Bills.

suits other projects of law operates very differently in the case of Appropriation Bills. In England the rejection of an Appropriation Bill is unknown ; but the abuse of such bills, whether by way of tack or by the inclusion of grants to which the House of Lords has taken objection, is equally unknown. The House of Commons not only does not exercise such powers, but asserts distinctly the duty of its forbearance. In this country the Legislative Assembly is not so careful to avoid cause of offence. Its view seems to be that the Council should be bound to follow the practice of the House of Lords in never rejecting Appropriation Bills, but that the Assembly should not be bound by the practice of the House of Commons in confining such bills to their legitimate function. In these circumstances the Council has anxiously sought for some remedy less injurious to the public interest and to Her Majesty's service than that of stopping the annual supplies. It has offered, not once but many times, to submit all disputes as to the interpretation of the Constitution Act to the decision of the Judicial Committee of the Privy Council. In its bill of this session to amend the Constitution Act it suggested, as will presently appear, the surest remedy for the evil. In the recent conference its representatives proposed two other alternative schemes which carried concession to its extreme limits, and thus deserved at least consideration. But all its efforts have been ineffectual, and it is still exposed to the danger of being held up to universal obloquy as the cause of a great public disaster, or of being compelled to accept, by means which can only be described as a fraud upon an Act of Parliament, some measure to which upon political grounds it entertains an insuperable aversion.

5. The primary cause of the unsatisfactory relations between the two Houses is, indeed, an encroachment, but it is an encroachment not of the Council, but of the Assembly. It has been already observed that the interference by the Council with the ordinary course of supply has never been spontaneous, but has been forced upon it against its will. The Council has always disclaimed any desire for financial control, and has resented the necessity for rejecting the Appropriation Bill as an intolerable grievance. But the claims of the Assembly have not been few, nor has its assertion of these claims been without offence. It insists that it stands in the exact position of the House of Commons, and possesses, whether by the Constitution Act or if not by some inherent vigour, all the financial privileges of that body. Such a claim has no foundation in law. The Legislative Assembly is not the House of Commons any more than the Legislative Council is the House of Lords. The two Houses of the Victorian Parliament are statutory bodies, all whose

Encroachments of Legislative Assembly.

powers and duties depend upon and are defined by the Act which they administer. As to financial matters, these powers are expressly set forth in the 56th section of the Constitution Act already cited. Whether they are more or whether they are less than those of the House of Commons, they are just so much, and so much only, as that Act, rightly construed, allows. But the Legislative Assembly does not bound its demands even by the privileges of the House of Commons. It claims powers to which the House of Commons has never pretended. It has claimed the right by its own unaided authority of ordering the expenditure of the public revenue. It has claimed the right of tacking Appropriation Bills to bills for imposing taxes. It has claimed the right to include in Appropriation Bills grants which involve grave questions of public policy, and to which it had notice that the Council objected. Finally, it now, by its bill, claims the right to make laws not only without the consent of the Council, but in spite of its expressed opposition. The last demand has, by the Chief Secretary, acting on behalf of the Assembly, been made the condition precedent of all amicable negotiations on the subject of constitutional reform between the two Houses. Such claims lead directly to the abolition of the Council, or—what would be worse—to its existence in a state of unconditional submission and open degradation.

6. It unfortunately happened that the equilibrium between the two Houses was disturbed very soon after the New Constitution came into operation. Under the Constitution Act a definite proportion between the two Houses was carefully observed. The property qualification for the members of the Council and that for its electors were respectively twice, with one slight exception, the amount of the qualification required for the members and electors of the Assembly. The duration of the Council was twice as long, and the number of its members was one half as great as that of the Assembly. In all these particulars fundamental alterations were at an early period made in the Assembly, while the structure of the Council remained unchanged. The property qualification of members of the Assembly was abolished. Manhood suffrage was established. The duration of the Assembly was reduced from five years to three. The number of its members was increased from 60 to 78, and by a recent Act to 86. Thus the relations of the Houses were necessarily disturbed. In 1868 a partial attempt was made to correct this inconvenience. The property qualification both for members and for electors of the Council was reduced by one-half, and in the case of the other qualifications the franchise was extended. In the present session the Council, after repeated deliberations, passed a bill by which it was proposed to make important alterations in the

Disturbance of original proportion between the two Houses.

same direction. The property qualification of electors was again reduced by one-half—that is, from a rating of £50 to a rating of £25. The property qualification of members was reduced from a yearly rating of £250 to a like rating of £150. The tenure of office was reduced from ten years to six, and the number of members was increased from 30 to 42. The number of the provinces was doubled, and other popular changes were proposed. But although changes of this character had by those who were opposed to the Council been often demanded, the bill which proposed those changes was not even taken into consideration.

Effect of the inequality of the Houses as to money bills.

7. So far as the aggressive tendency of the Legislative Assembly is due to positive law, the source of the evil lies in that provision of the 56th section of the Constitution Act which provides that the two classes of bills therein mentioned may be rejected but not altered by the Council. This provision is the result of an attempt to reduce into a statutory form the well-known practice of the Imperial Parliament. There is, however, an important difference between the two cases. In England the origination of money bills by the Commons is a rule of law; but the exemption of such bills from amendment has no legal validity, and is a mere practice dependent on the prudent forbearance of the House of Lords. In Victoria both the origination and the exemption from amendment are regulated by the Constitution Act. Such a conversion of a custom into law not unfrequently produces unexpected results. The elasticity of a custom, and the reluctance to press to extremities a disputed right, lead to consequences very different from those which follow from the precise terms of an Act of Parliament and from a sense of statutory superiority. This unfortunate provision is peculiar to Victoria. Neither in England, nor in any constitutional colony, nor in the United States, nor in any single state of the numerous states included in the Union, is a similar power conferred upon either House by law. The origination of money bills is indeed given by law in accordance with the English precedent—although in America even this rule is not always observed—to the more popular of the two Houses. Whatever in other respects their practice may be, the legal distinction does not go further. In all these countries deadlocks, such as those with which we are too familiar, are unknown. Yet these countries, especially the other colonies, and Victoria agree, so far as regards their political institutions, in all other material respects except in this, that Victoria has, and that these other countries have not, an inequality in the powers of the two Houses in regard to the amendment of money bills. It is thus no rash inference that this inequality is the cause of deadlocks. It was under this conviction that the

Council passed the bill of this session to amend the Constitution Act. It seemed the wisest course to remove the root of the evil. It is not that the Council* desires any financial power beyond that which it possesses. But the removal of a useless inequality would take away both the belief in an undefined superiority and the temptation to misuse an acknowledged power.

8. There are other circumstances in which a deviation from the spirit of English precedents has tended to place the Council at a disadvantage. Neither from the Governor, nor the advisers of the Governor, has the Council hitherto received proper consideration. This defect is probably a consequence of the aggressive tendencies of the Legislative Assembly; but these tendencies have been stimulated, and not restrained, by the action of the Executive. In England the Crown has not hesitated, when occasion required, to exert all its influence in order to restore and to maintain harmony between the two Houses; and it has invariably refused to lend its aid to either House to the detriment of the other. In this country a different practice has occasionally prevailed. Some Governors appear to have understood the principles of responsible government to mean that they were thereby deprived of all discretion, and that they were bound to permit the ministry of the day not only to use the whole power of the prerogative, but to strain it, for the purpose of giving effect to the wishes of the Assembly against the Council. It has already been observed that the quarrels between the two Houses have arisen, not from the continued opposition of the Council to any legislative proposal on which the public mind was, or was supposed to be, intent, but from the abuse of the special financial powers of the Assembly. In every one of these cases the abuse of privilege was followed by an abuse of prerogative. The tack of 1865 was followed by those dealings with one of the banks which the Secretary of State declared to be illegal, and which led to the recall of Sir Charles Darling. The inclusion of the Darling grant in the Appropriation Bill led to the collusive judgments and the consequent modes of discharging public obligations which the Supreme Court emphatically condemned. In the dispute about the payment of members the present Governor considered that he was justified in dismissing in a body all the inferior judges and other judicial officers, and thus in suspending, acting on the advice of his responsible ministers, without any pretence or colour of law, numerous Acts of Parliament, and in stopping for large classes of Her Majesty's subjects the administration of justice itself. A list of the principal Acts and

Disregard of the Council by the Governor.

* See preamble to Bill for altering the Constitution Act. Appendix A.

parts of Acts thus illegally suspended is appended hereto. For this proceeding, directly contrary to the terms of his commission, and in open violation of the principles declared by the Bill of Rights, this Council made at the time complaint to Her Majesty ; but Her Majesty has not yet been advised to grant any redress in the matter, or even to acknowledge the receipt of the Council's complaint. It would have been absolutely impossible for any ministry to have wrought the mischief that has on these several occasions, but most of all within the present year, been done in the country, without the active assistance of the Governor. If proof of this assertion be wanting, it is found in the readiness with which the unlawful proclamation of the 8th of January last was cancelled on the 24th of the same month. The Governor has at all times sufficient means to enforce the observance of law if only he think fit to use them.

Appendix D.

9. As regards the relations of the two Houses and the Executive, there is a remarkable difference in the practice of this country and of England. In England the House of Lords always is largely represented in the ministry. Not to speak of the earlier part of this century, when the preponderance of peers in the Cabinet was immense, it may be stated that, according to the present practice, about half the Cabinet consists of peers. At least four Cabinet offices—those of the Lord Chancellor, the Lord Privy Seal, the Lord President, and one Secretary of State —are necessarily held by members of the House of Lords. The number of peers otherwise connected with the administration is also considerable. In practice every great department* is represented in both Houses of Parliament. No administration could be formed in England from one House exclusively, and no such attempt has ever been made. "The fixed character of our Constitution," said the late Earl of Derby, "renders it the interest, not to say the paramount duty, of every minister so to shape his course as, if possible, to keep the two Houses of Parliament in harmony, and not to throw himself absolutely and entirely into the hands of one branch of the Legislature, regardless of the wishes and feelings of the other." But in this country there has never been more than one minister in the Council, and that minister very rarely represents any of the more important departments. Frequently there has been none, and the Government business has been conducted by some person having nominally a seat in the Cabinet, but not holding an office under the Crown or exercising any influence in public affairs. At the present time not even this

Disregard of the Council in the formation of ministries.

* See Todd's *Parl. Govt.*, ii. 250, 254.

nominal representation exists. The late Postmaster-General, as has been already stated, resigned his office because he could not support the Reform Bill; and he now, through courtesy, takes charge of Government business, but he is not a member of the Cabinet. Nothing, indeed, can more forcibly show the neglect of the Council by the Executive and the mischievous consequences of that neglect than the fact that not a single member of the Council can be found to move the second reading of the ministerial Reform Bill. Yet that bill is said to be of such importance that not merely the existence of a colonial ministry and of a colonial legislative chamber depends upon it, but even Imperial interests are supposed to be not remotely nor indirectly involved. If the Council had been properly represented in the administration, the open contest between the two Houses would have been withdrawn to the confidential deliberations of the Cabinet. It is one great function of the modern ministry to prevent collisions between the Crown and Parliament. But it is also its duty to mitigate, if it cannot entirely prevent, the evils of collision between the two Houses. No such duty has been here recognized; and the result has been that, where the ministry happens to command a large and compact majority in the Lower House, the Council practically performs the functions which of right belong to the Opposition in the Assembly.

10. For a long time attempts have been systematically made in this country to create a belief that the Council is composed of and represents persons of a single class, and whose interests are hostile to the interests of the general community. These statements seem, by force of constant iteration, to have been, to some extent, accepted in England. Instead of general contradiction, it will be preferable to state briefly certain facts, which are specified in an appendix and can easily be verified, as to the composition of the Council and of its constituencies. The qualifications of electors for the Legislative Council are threefold. They arise from property, or from profession, or from education. Under the property qualification are included the owners, lessees, or occupiers of property rated at £50 a year. Under the professional qualification are included all members of the learned professions, all certificated schoolmasters, and all retired naval, military, and Indian officers. Under the educational qualification are included all graduates of any university in the British dominions, and all matriculated students of the University of Melbourne. A contested election for the Central Province, which includes Melbourne and its suburbs, was held on the 27th of August last. There is appended hereto an analysis of the occupations

Alleged class character of Council.

Appendix E.

Appendix F.

of the electors who polled on that occasion. This analysis will perhaps not appear to be consistent with a statement which, in his place in Parliament, on the 7th November, the Chief Secretary is reported to have made, that the members of the Legislative Council "are elected by a very limited portion of the population, not particularly remarkable for intelligence, close application to politics, or for the high stand-point from which they view the public matters of the colony." Had it not been for this assurance of the Chief Secretary to the contrary, it might have been thought that the thriving, industrious, and intelligent classes enumerated in this list form some portion of the "people" of this country, and are entitled to some share in determining its legislation.

11. Nor is there any reason to doubt that the present Council faithfully reflects the opinions of its constituents. It will be remembered that the Council is not subject to a general dissolution, either by the act of the Crown or by the effluxion of time. Its renewal is effected by means of biennial elections, which extend on each occasion to one-fifth of its entire number. It so happened that when the ministerial Reform Bill was before the Assembly the time for these periodical elections arrived. In four out of the six provinces no attempt was made by the ministers to avail themselves of the opportunity which the constitution thus afforded them to increase their strength in the Council or to test public opinion. Two retiring members and two new members, all opponents of the ministerial bill, were elected without opposition. In the fifth province the retiring member was opposed by a candidate in the ministerial interest, and was returned by a large majority. In the sixth—that is the Central Province—the retiring member did not seek re-election ; and a contest, which was generally accepted as a trial of strength, took place between an avowed supporter and an avowed opponent of the ministry. The result was that, in this, the most populous and the wealthiest constituency in the colony, the ministerial candidate was defeated by the largest majority ever, it is believed, obtained in this country. Thus that appeal to its constituents which the law has provided for the Council has resulted in a condemnation of the ministerial bill so decisive that that bill has not in the whole House one solitary adherent.

Council faithfully reflects opinions of its constituents.

12. In these circumstances the Council, thus supported by its constituents, declines to consent to any proposal which involves, or tends to involve, legislation for this country by one House only. It is the more confirmed in its resolution by the fact that neither the present ministerial bill nor any other bill with similar provisions has been placed before the constituencies

Opposition of Council to ministerial bill justified.

of the Legislative Assembly. There has been no agitation upon the subject. There has been no change of ministry. There has been no dissolution of the Assembly. The bill has not even been passed a second time after reconsideration by the present Assembly. Instant submission to the demands of a party that has for the time secured the executive government is peremptorily required. But those demands are to destroy the system of Parliaments by reducing one House to a sham ; to destroy representative institutions by substituting for them a *plébiscite ;* to destroy colonial self-government by invoking, in a case where the law already gives to the colonial Legislature ample powers of change and where no serious attempt has been made to exercise much less to exhaust these powers, the interference of Imperial authority. Ambiguous words have been spoken, and hints, meaningless if they do not approach to treason, have been suggested by ministers of the Crown, and by some of their leading supporters, as to the consequences that may be expected if the Imperial Parliament decline to abolish our existing Constitution. This Council is not aware that in exercising, as it has done, its lawful powers, it has thereby deserved the punishment of annihilation. It is satisfied that it has honestly endeavoured to do its duty ; that it has been, and still is, willing to make any reasonable concession, not inconsistent with its duty, for the sake of peace, and of the great interests confided to its care ; and that both it and the people whom it represents desire above all things to live under the tempered freedom of Her Majesty's rule, and according to those good laws and honoured institutions which have for centuries been the birthright of Englishmen.

[*The appendices are omitted.*]

II.—LECTURE ON THE COLONIES AND THE MOTHER COUNTRY.

I PROPOSE to address you this evening upon a subject of no common interest, of no common importance, of no common magnitude. I need not dwell in a meeting of colonists upon the interest which attaches to our relations, whether they be friendly or whether they be unfriendly, with the dear mother-land. The importance, too, of the subject, when we bear in mind the theories that but recently have been in vogue in England respecting the colonies, and the cruder, although not less

dangerous notions that we sometimes hear among ourselves—the importance, I say, of the subject is equally obvious. But that character of it which at this moment most presses upon me is its magnitude. In the brief space of time that is at my disposal, I know not how, if I seek for something better than to wile away with sentimental platitudes an idle hour, I can give you a clear and intelligible statement of the history and the principles of colonization. Gladly would I tell you of the earliest movements of which history preserves any trustworthy record. Gladly would I tell you of the Hellenic emigrant, taking with him the holy fire from his Prytaneum, and setting forth under a chief who, after death, was to be the guardian spirit of the new settlement, to establish across the seas a new community, politically independent indeed of its metropolis or mother state, yet ever turning to that metropolis with the deepest sentiments of reverence and love. Nor is the temptation less to enlarge upon the primitive *colonia* or plantation (for such is the meaning of the word) of Rome. That body was not a band of emigrants seeking their fortunes, nor did they cross the seas, nor did they found a separate community. The Roman colonists were a brigade of citizen soldiers, despatched upon a special service. They were to garrison in behalf of the City Rome some conquered or half-conquered Italian town. So far from severing the old tie, they held their colony as sons held their acquisitions, for the use of the family of which they were members. Much, too, I might say of our own early colonization. But it is not of Grecian or of Roman or even of English colonization generally, that I am about to address you. I must speak this evening of one part only of this great subject—of that part which directly and immediately affects ourselves. I propose, in a word, to describe to you, as best I may, the structure and the organization of that remarkable political product of modern times, the constitutional colony of the British Empire.

I must commence with a proposition which will sound to you all as a mere truism. That proposition is, that we colonists are the natural born subjects and liegemen of the Queen. On this point there is no room for doubt. The tie of allegiance is in its nature personal; and its consequences, both of protection on the one side and of obedience on the other, extend and continue, so long as the relation lasts, through every part of the world. A British subject who buys or sells slaves in Chili, although he may be resident in that country, and although by the law of that country his traffic is permitted, is by English law guilty of felony. He is safe, indeed, so long as he remains in Chili, but if he be found, either on the high seas or in any part of Her Majesty's dominions, he will be punished as the law directs. *A fortiori*, then, the English law is binding

Colonists are Queen's liegemen.

upon Her Majesty's subjects who merely remove from one portion of her dominions to another portion. Nor is it merely the burden of the law that thus follows us. We take its benefits as well as its burdens. Our ancestors on all great occasions have always claimed the Common Law, not as a matter of policy or on any ground of expedience, but, to use their own emphatic words, as their birthright. In the Great Charter and other similar instruments the words declaratory of rights are those by which landed property in its highest form, that of an estate in fee simple, has always been conveyed. The King for himself, his heirs, and successors, grants their liberties and free customs to his subjects and their heirs for ever. There is no limitation of time or place. And so it has always been held that Englishmen who emigrate from England take with them those liberties and free customs, or so much, at least, as the nature of the case renders possible. Thus, when a new community is formed in some distant place, Her Majesty may, by her prerogative, organize and incorporate that community, just as she may incorporate any number of people for any lawful purpose in England, and she may prescribe the form of their government and of their courts. But that government must be representative; no tax can be raised, and no new law can be enacted, except with the consent of the community, as expressed by their representatives; and the courts must proceed by the rules of the Common Law, and by no other method. Such is the doctrine of the Common Law; and although colonies are now usually founded by Act of Parliament, and not by prerogative, these fundamental rules are scrupulously observed.

Thus the principles by which Englishmen are governed are the same all the world over. But the application of these principles varies, as the circumstances of each case vary. It is almost, if not altogether, physically impossible to govern from London large communities at the other end of the world. Nor would any attempt to do so be consistent with that right of self-government which, as we have seen, forms part of our birthright. Hence arises a very peculiar organization — peculiar, I mean, in its results, for it is a mere extension of a simple and familiar principle. As every town in England makes its own by-laws, while it is subject to the general law of the land; so in the extended aggregate which we call the empire, each colony makes its own laws for its own wants, while in all other respects it remains subject to the central government. Or, to put the matter in another aspect, colonists are subject to two kinds of law, one personal the other territorial. To the former they are subject by virtue of their allegiance; to the latter they are subject by the Common Law right of self-government,

Colonial liberty is English liberty adapted to new conditions.

confirmed and regulated and applied by the Constitution which has been given by the Imperial Parliament.

Action of Imperial and of Colonial Parliaments now reconciled.

We have thus in Victoria, and in every other constitutional colony, two distinct legislative organs. The one is our own Parliament, the other is the Imperial Parliament. Both these powers are in active operation. Most people are not fully aware of the extent of Imperial legislation for the colonies. The general rule is that no Act of the Imperial Parliament binds the colonies unless an intention so to bind them appears either by express words or by necessary implication. But not a session passes in which there are not statutes which expressly relate either to all the colonies or some of them. Such, to take but a few recent examples, are the statutes relating to naturalization, to extradition, to merchant shipping, to governors' pensions, to colonial attorneys, to colonial clergy, to kidnapping, to Chinese passengers, and many others of the same kind. It becomes, therefore, a question of great interest and importance to ascertain by what means the action of these two legislative bodies is reconciled. That they are reconciled is obvious, because ever since our existence as a colony they have worked together, and yet their working has been so smooth that it is almost unnoticed. I think that the controlling agencies are—1. The supremacy of the Imperial Legislature in any case of conflict ; 2. The care with which, by the practice of the Imperial Parliament, conflicts are avoided ; 3. The moderating influence of the Crown under responsible government. As to the first point, the supremacy of the Imperial Legislature, the rule of law is fundamental and unquestioned. It was well settled by Common Law, and it has been declared by an Act of Parliament* passed in the year 1865, which is worthy of your attention. Originally the rule ran, much in the same form in which power is usually given to corporations to make by-laws, that a colonial Act must not be repugnant to the law of England. Such a restriction, if it were construed literally, would have proved too severe ; and accordingly repugnancy was defined to imply, not diversity, but conflict ; that is, if there were an Imperial law and a colonial law on the same subject, but with different enactments, the Imperial law must prevail. Thus, for example, when, some years ago, the law of primogeniture was repealed in this colony, some persons thought that such departure from the rules of the Common Law was beyond our powers. But primogeniture was never made by any Imperial law binding upon the colonies, and it was therefore quite within our competence to alter the rule if we saw fit to do so.

* 28 and 29 Vict. c. 63.

Upon a much smaller matter a case occurred some years ago which illustrates the present subject, and which also shows the manner in which, by a little courtesy and good feeling, difficulties when they arise between the two Legislatures are removed. Certain Acts of the Imperial Parliament* contained provisions relating to the admission of evidence in any court of law within any of Her Majesty's dominions. These provisions, however useful, were not particularly interesting. They dealt with the substitution of declarations for oaths, and for the admission of public documents without proof of the authenticating seal or signature, and with similar details. Shortly after the commencement of our new Legislature, the Parliament of Victoria passed an Act† to consolidate and amend the law of evidence. In this Act our Parliament repealed the Imperial Acts I have mentioned, and re-enacted in another form and with a different arrangement their provisions. The Act received the Governor's assent, but the Colonial Office objected to it, on the ground that it professed to repeal Acts of the Imperial Parliament expressly applying to the colonies. The offending Act was not, however, disallowed. An Act of the Imperial Parliament‡ was passed repealing, so far as Victoria was concerned, the Acts of Geo. III. and Wm. IV., which we had affected to repeal, and enabling the Legislatures of other colonies to repeal these Acts if they thought fit. On the other hand, the Parliament of Victoria repealed the Act to which objection was taken, and passed a new Evidence Act,§ avoiding, of course, its former mistake; and in this Act it recognized and declared that the section of the Act of Her Majesty which in its former Act it had attempted to repeal, and which it was necessary to retain as part of the Imperial law, is in force in Victoria. Thus, when the mistake was pointed out, the Imperial Parliament hastened to give the Victorian Parliament the power that, in relation to a particular subject, it desired; and the Victorian Parliament was not slow to acknowledge that it had exceeded its powers, and of its own accord to withdraw a pretension that could not be sustained.

It may be asked how is this superiority of English law enforced. The answer is that such superiority is part of the law of Victoria, and is consequently enforced in the same way as all law is enforced. The judges have to administer the law, and the Imperial Acts which bind the colonies form a part of the law with which the judges are charged. If there be a collision, or a seeming collision, between any parts of that law, there are rules which guide their decision. Such conflicts are not unknown to

Supremacy of Imperial law, how enforced.

* 54 Geo. III. c. 15; 5 and 6 Wm. IV. c. 62; 14 and 15 Vict. c. 99 s. 11.
† No. 8. ‡ 28 and 29 Vict. c. 12. § No. 1[illegible].

lawyers. The Statute Law may conflict with the Common Law; two statutes may conflict with each other; the schedule may conflict with the body of its Act. In all these cases the rules of construction are familiar to every lawyer. So, too, where the local law clashes with the Imperial law, there is a fixed rule which determines the action of the court. It is for this reason that we find a notable difference in these colonies and in the United States between the relations of Parliament and the judges from that which exists in England. In England the validity of an Act of Parliament is never called into question in the courts. An Act is published as law by Her Majesty in the usual way, and the courts will not go behind it, or inquire whether it was or was not passed with the proper forms. But in the United States there is a written constitution, which imposes certain limits upon the legislative power, not only of the separate states, but of Congress itself. This constitution is part of the law which the Supreme Court administers, and that court is, therefore, bound to ascertain whether any given law conflicts with the constitution or not. For the same reason our colonial courts are bound to take notice whether an Act has been passed in the mode required by the Constitution Act. The Constitution Act and the Act to which objection is taken are alike part of the law which it is their duty to administer; and it is not competent for them to evade their duty, however unwelcome its performance may be.

There is another and still more effective method for securing the harmony of the two Legislatures. There is an old saying that prevention is better than cure. Of this homely truth the subject of which we are now speaking affords a remarkable illustration. The Imperial Parliament possesses the power of legislating for the colonies, and it has occasionally exercised that power, and has frequently intimated its readiness to exercise it. But this power, like every other public power, ought to be recognized in a reasonable manner and in pursuance of a wise discretion. It is therefore a fundamental maxim of Parliamentary law that it is unconstitutional for the Imperial Parliament to legislate for the domestic affairs of a colony which has a Legislature of its own. You will observe the important distinction between that which is legal and that which is constitutional. It is perfectly legal for the Imperial Parliament to pass laws without consulting the colony, or even against its expressed wishes, upon every subject that is of interest to us—for constructing public works, for disposing of public lands, for appropriating public money. If such laws were passed they would be binding upon us, and it would be the duty of the courts and of the Government to enforce them. But such an exercise of power would be contrary to the usages of the country; it would disappoint the

Constitutional usage of Imperial Parliament as to colonial questions.

reasonable expectations of the colonists, and it would not be in pursuance of a sound discretion. "The transcendental power of Parliament over every dependency of the British Crown," said Mr. Canning, in a speech quoted with approbation by Sir Robert Peel, "is an arcanum of empire which ought to be kept back within the penetralia of the Constitution. It exists, but it should be veiled. It should not be produced on trifling occasions, or in cases of petty refractoriness, or temporary misconduct. It should be brought forward only in the utmost extremity of the state, where other remedies have failed, to stay the raging of some moral or political pestilence." Therefore, the Imperial Parliament sedulously abstains from all interference in matters of purely local legislation—that is, in matters which affect the colonists exclusively, and do not directly concern others of Her Majesty's subjects. The only cases in which the Imperial Parliament consents to intervene are—first, when its action is invited by the colonial Legislature; and second, when the colonial Legislature is, so to speak, out upon strike—that is, when it habitually refuses or neglects to perform its proper functions. Of the former case there are many examples. Our own Constitution Act and the Constitution Acts of the other Australian colonies were passed by the Imperial Parliament at the request of the respective colonial Legislatures. On the other hand, the Constitution of Jamaica, one of the oldest of the British colonies, was but a few years since taken away by an Imperial statute upon the request of the colony itself. The occasions on which the Imperial Parliament has interfered with the action, or rather the inaction, of a refractory Legislature are rare, partly because other means have usually been sufficient to induce a return to wiser counsels, and partly because the intimation that Parliament would be asked to interpose, and the knowledge that it had the power so to interpose, rendered unnecessary any active interference. Thus, in 1838, when the Legislature of Jamaica refused to provide the necessary supplies, power was by Act of Parliament given to the Governor-in-Council to pass the usual Appropriation Acts if the Legislature persisted in its refusal. We ourselves have not escaped without a significant hint. In January, 1866, Mr. Cardwell, then Secretary of State for the colonies, wrote to the Governor of Victoria in the following terms:—"It is not to be supposed that in any province of the Crown peopled by the British race, and enjoying representative institutions, there will be wanting that spirit by which alone representative institutions flourish, of obedience to the law and of reasonable concession in order to avert violation of the law. Her Majesty's Government cannot doubt that a firm determination in years past to observe the law, and an appeal in this spirit to the colony, will be responded to and accepted

by the general sense of the community. It would be very unfortunate that the colony should be unable by its own forbearance and wisdom thus to solve its own difficulties, and I should greatly regret if any necessity should ever arise for a reference of such difficulties to the Imperial Parliament; but in an extreme case that course is always open, and, undesirable as I should hold it to be, it would be infinitely preferable to a violation of the law."

There is a third means by which the harmony of the two Legislatures is maintained. That means is the authority and the influence of the Crown. The Crown is, indeed, the bond by which the huge and scattered empire is held together. Partly this influence operates vaguely upon the community at large through the sentiments traditionally generated by the common allegiance. But in its legal aspect the Crown operates as the great central force of our political system. It is Her Majesty that makes laws, both in the Imperial Parliament and in the colonial Parliament. In each case Her Majesty is assisted by different advisers, but the action is in both cases that of Her Majesty. She therefore has the opportunity of reconciling the conflicting pretensions of her separate Parliaments, of keeping each within its proper limits, and of averting the danger of collision. In the first place, the consent of the Governor is necessary for all colonial legislation. But the Governor is the officer of the Queen, is bound to obey her commands, and is removable at her pleasure. There are certain classes of bills to which by his instructions he is not permitted to give the Royal assent, and which he is required to reserve for Her Majesty's special consideration. Her Majesty may in such cases give or withhold her assent, unembarrassed by any action of the Governor. In all cases, however, after the Governor has assented whether rightly or wrongly to a bill, the Crown retains the power of disallowing * that bill within a period of two years. Hence the announcement which we sometimes see that such and such Acts will be left to their operation. This means that the Acts, after having been assented to by the Governor, have been sent home, have been there considered by the proper officers in the Colonial Office, and that it is not intended to advise Her Majesty to exercise in respect of these bills the power of disallowance. I think that the exercise of this power must be now very rare. I do not recollect any instance of it in this country, nor can I recall any conspicuous instance of it elsewhere in recent times. We have, indeed, not unfrequently cases in which from reserved bills the Royal assent has been for various reasons withheld. The most frequent ground

Influence of the Crown upon the two Legislatures.

* 5 and 6 Vict. c. 76 s. 33.

of objection has been that the colonial Legislature has exceeded its powers. For example, when, in 1864, our Acts were consolidated, a bill was prepared consolidating into a single statute the numerous Acts relating to the customs and excise, and re-arranging their provisions. It was simply a consolidating bill, and did not affect to make any substantive change in the law. It passed both Houses, but under the Governor's instructions it was necessary that, as affecting the customs, it should be reserved for the Royal assent. That assent was withheld because the bill contained a provision to guard against smuggling, prohibiting any person from touching casks of spirits floating in the sea within a hundred leagues of Victoria. Undoubtedly such a clause was in excess of our powers, for our Parliament makes laws in and for Victoria, and not for 300 miles out at sea. But the clause was copied from the existing Customs Act, which in turn had without any thought been originally copied from the English Act. The curious result of the loss of the bill is that that very section to which objection was taken still * forms part of our Customs Act ; and if some day the customs authorities prosecute some skipper for taking up some casks of good brandy that he finds knocking about twenty miles outside the Heads, the Supreme Court will have to determine whether a conviction under that section of the Customs Act of 1857 can be sustained.

Remonstrance of the Home Government against colonial legislation.

Sometimes, although more rarely, the Home Government objects to a colonial bill on the ground of its policy. It then states the reasons of its objection ; if the colonial Parliament feels the force of these arguments, the bill is either modified or quietly falls to the ground, and no more is heard of it. If the arguments are not convincing, an animated correspondence ensues. But unless third parties are affected, the Home Government is usually content with having secured full and renewed consideration of the subject, and, after having had its say, generally yields to the wishes of the colonists. It sometimes happens that the object which the colonists desire cannot be obtained without an Act of the Imperial Parliament. In this case the action of responsible government becomes apparent. Just as one great function of the ministry is to prevent any collision between the Crown and Parliament by taking upon itself the burthen and the blame of the controversy, so the ministry also interposes when the two Parliaments are likely to disagree. As a general rule, the Imperial Parliament will pass any bill relating to the colonies that the Government in which it has confidence recommends, and will not pass any bill not so recommended. It, of course, retains its right of criticism or even of rejection ; but as a

* This error has been corrected in the Customs Act 1883, No. 768.

general rule, unless, as has sometimes happened, the matter be made for some reason a party question, Parliament is content to accept the advice of ministers, and is reluctant to act without the guarantee of their responsibility. Thus the two Legislatures rarely come into direct collision. The matter is fought out between the Colonial Government and the Colonial Office. If the latter yield, the desired Act is passed with little discussion. If it keep firm, the colonists must content themselves with grumbling until a more pliant minister sits in Downing-street. Such, for example, was the question relating to the imposition of differential duties in favour of the other Australian colonies. Under the provisions of the Constitution Act it was not competent for our Parliament to pass such a measure, the reason being that such duties were inconsistent—or supposed to be so—with Her Majesty's treaty obligations with foreign powers. At length, most reluctantly, the Colonial Office gave way, and the desired Act * was passed. It is obvious that no such bill, if proposed by a private member, would have, or indeed ought to have, received a moment's attention. It is strange that after all the disturbance and all the tall talk, this Act has remained simply a dead letter. Nor is it likely to have any effect so long as the systems of financial policy in the several colonies are fundamentally different.

I have so far spoken of the relation between the Legislatures of the mother country and of the colony. We have now to consider the relation between their respective Executives. In other words we have to consider how responsible government, as it is called, in the one country can be reconciled with responsible government in the other country. I must first remind you of what I have already said as to responsible, or, as it is perhaps better called, constitutional, government. It assumes invariably the legality of the acts in question. There is no question in it as to law, but only as to discretion. But as the whole administration of the law is vested in the Crown, the discretionary powers of the Crown are enormous. It is lawful for Her Majesty to make war or to conclude peace, to pardon every criminal, to confer every title of dignity, to distribute as she pleases the vast patronage of the empire. No person can dispute her powers in any of these respects. It is obviously of vital importance that these immense powers should be wisely exercised. To secure this object the law provides that Her Majesty shall act officially in a certain way, and through certain specified servants. Further, the practice of the constitution is that Her Majesty shall select and retain those servants subject to the advice of Parliament.

The double form of responsible government.

* 36 Vict. c. 22.

By this remarkable contrivance, the result of the controversies of many generations, and perfected only in our own time, the Queen employs certain professional advisers ; while she continues to employ them, she follows their advice. If they give her advice of which she cannot approve, she seeks other assistance. If the advice which they give, and upon which she acts, be not in accordance with the views of Parliament, Parliament makes no attempt directly to interfere with the functions of the Crown, but advises Her Majesty to change her principal servants. If Her Majesty be disinclined to accept this advice, she may change her Parliament—*i.e.*, may dissolve the House of Commons ; and as between the existing ministry and their opponents the decision of the new House is final. These principles are applied in the colony in the same way in which we have seen that the rules for legislation are applied. In all purely colonial matters, that is, in matters exclusively affecting the colony, the Governor exercises his discretion, with the advice of his ministers and subject to the general superintendence of the Parliament of Victoria. It is necessary to observe that in the colony, as in the mother country, these rules relate exclusively to matters of discretion. Everywhere, whether in the mother country or in the colony, the legality of the act is taken for granted. With Englishmen the law is always supreme. It is no excuse for the Queen, much less is it an excuse for the Governor who is the servant of the Queen, that illegal acts have been committed in conformity with the advice of ministers. When King James II. lost his throne, the famous resolution which declared the throne vacant recited various offences which he had committed "under the influence of evil advisers." The offences were his offences, by whatever means he had been led into wrong-doing. And if this be true in such exceptional circumstances as those in which the Sovereign, against whom the law provides no remedy, is concerned, much more so is it the case when the servant of the Crown is concerned, for whom the law entertains no delicacy, and for whose misconduct it provides very sharp and specific remedies. If a Governor commit any illegal act in his colony, whether he has been advised to do so or not by his ministers or by any other persons, he is liable to be prosecuted, when he returns to England, before the Queen's Bench. Even in the courts of his own colony he is, as it has been lately held, liable to civil proceedings ; and he is of course liable to removal from office if Her Majesty think fit ; but when he is out of office criminal proceedings may be taken against him in England, as they were recently taken against Governor Eyre, and as, in former years, they were taken with success against many colonial Governors. In no circumstances does the law accept as an excuse for an offence the advice of any other person. In matters o

discretion, for constitutional purposes, for the censure of Parliament, and the consequent removal of ministers, such an excuse may be sufficient. But, as I have said, no constitutional act can be illegal, and the assumption is that every subject of Her Majesty, and, above all, the confidential servants of Her Majesty, must have sufficient judgment of their own to keep them within the limits of the law.

It may be asked, what is a Governor to do if his ministers, backed up by public opinion, press upon him some illegal course? The answer is very simple. He must at all hazards continue to say "No."

Duty of a Governor as to illegal advice.

Doubtless, his position may be very embarrassing and very uncomfortable; but his duty is, as duty generally is, plain enough. If the colony really desire something forbidden by Imperial law, the colony must apply to the Imperial Parliament for a change in that law. When that change is made, but not before, the Governor is free to act. Thus, in such a conflict as I have supposed, he simply transfers the difficulty to his principal; and then the case comes within that collision of Legislatures of which I have already made mention. But such cases are of the rarest. The people of a free country are seldom fools; and if the Governor is firm, they soon see that the law must be obeyed; if they have a real grievance, they proceed to agitate for its redress by the proper and constitutional means; if they have not such a grievance, they return to their usual business, and are soon glad that they have been saved from themselves and from their leaders. Thus, both in their legislation and in the administration of their own affairs the inhabitants of a constitutional colony have all the rights and all the powers that their countrymen at home possess in relation to purely domestic matters. The sole condition of this power is that they shall obey the laws which they have themselves made, or to which, as parts of a great complex community, they are necessarily subject. With this one light and not unreasonable limitation, the colonists, like other men, have set before them the good and the evil. They are free to take the one and to leave the other; and when they have made their choice, they must abide its consequences.

Such is a brief description of the leading features of our political system. The same general principles of government which have been matured in England have been transmitted to us, with only such adaptation as the necessity of the case requires, for the regulation of our domestic affairs. The same principles by which the several parts of the empire are governed are applied, so far as may be, to the government of the whole. These principles are, I believe, the maturest product of political wisdom that the world has yet seen; in no other country have liberty

Theory that the Victorian Constitution has failed.

and good government been so successfully combined. What further developments of these principles the course of time may bring with it, no human being can predict. But I think we may say, if we can at all judge of the future by the past, that these changes to come will be no arbitrary alterations, but such developments as are essential to life and as tend to greater magnitude and to higher organization. It is, unfortunately, the fashion of some among us to decry, although for different reasons, these noble institutions; to declare that the Constitution has broken down; to go to Norway for a Parliament, and to France for the means of superseding a Parliament; to bid, like Lord Byron, their native land good-night; to trust themselves to the frail bark and the wide wide sea of communistic speculation,

> "Nor care what land they bear me to,
> So not again to mine."

As to those who profess to revere our national institutions, but who declare that the Constitution in this country has broken down, it is difficult to know whether one ought to laugh or to be angry. It is at least quite certain that the disgrace of the failure—if failure it be—must rest, not with the institutions themselves, but with the men who have worked them. Why should Englishmen in Australia work their ancestral Constitution with less success than Englishmen in England have done, and are still doing? I, for one, have an unbounded belief in English institutions and in English men; and although we may sometimes stray from the right path, I do not fear that, sooner or later, we shall become conscious of our error, and return to the ways of truth and soberness.

For those—and I think that, after all, they are not many—who really dislike our national institutions, and are anxious to replace them with others of their own invention, I, of course, pretend no sympathy. There is no common ground between us. They rely upon general principles which they formulate from their own philosophy or from some supposed view of human nature. Without even discussing these views, it is enough for me that they are inconsistent with the traditional usages and history of our country. English liberty has never rested upon any considerations of expediency, or any speculation about the rights of man or the brotherhood of nations. Our liberty has always been a practical matter, and has always been maintained, not by dreamers, but by practical men. It has, as I have already had occasion to observe, been always treated as an entailed estate, which has descended to us from our ancestors, and which it is our duty to transmit unimpaired to our posterity. It is not liberty in the abstract with which we have to do, but that very concrete form of orderly freedom which has

come down to us through fifty generations and fourteen hundred years. Nor is it of small importance that we should accustom ourselves to think, as our ancestors have always thought, of this English liberty in the character of an entailed inheritance. "Always acting," says Edmund Burke,* "as if in the presence of canonized forefathers, the spirit of freedom, leading in itself to misrule and excess, is tempered with an awful gravity. This idea of a liberal descent inspires us with a sense of habitual native dignity, which prevents that upstart insolence almost inevitably adhering to and disgracing those who are the first acquirers of any distinction. By this means our liberty becomes a noble freedom. It carries an imposing and majestic aspect. It has a pedigree and illustrious ancestors. It has its bearings and its ensigns armorial. It has its gallery of portraits, its monumental inscriptions, its records, evidences, and titles. We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men, on account of their age, and on account of those from whom they are descended. All your sophisters cannot produce anything better adapted to preserve a rational and manly freedom than the course that we have pursued who have chosen our nature rather than our speculations, our breasts rather than our inventions, for the great conservatories and magazines of our rights and privileges."

We have thus before us the picture of an ancient empire on which literally the sun never sets, containing numerous dependencies of every race and colour and degree. With many of these we are not now concerned. They are, so to speak, the naturalized members of the state. They have obtained this position at the sacrifice, more or less great, of political independence. They may say with the chief captain of old, "With a great sum obtained I this freedom." But we colonists are entitled to sympathize with the Apostle's boast, "but I was free-born." How long, then, is this assemblage of free-born Englishmen united on the principles I have thus described to continue? How long will the empire endure, and the colonies remain united with the mother country? Without hesitation I answer, "With God's blessing, for ever." I know well that very different views have been put forward by eminent writers, and that very different language has been used by public men. But without now entering into the controversy, I may say that that fashion has for some years passed away. The natural good sense of the people, both at home and in all the colonies, was wiser than the paradoxes of a very shallow and very mistaken philosophy. That system seems to have assumed that perfect political maturity could not be

The colonial relation permanent.

* *Works*, iv. 178.

obtained without ultimate political independence. This proposition further assumed that a constitutional colony was essentially distinct from England. Neither of these assumptions can, in my opinion, be maintained. We are, it is true, distinct from the island called England, and from the local concerns of that island. But of that England which denotes the political relations of Englishmen in whatever part of the world they may be, we claim to be part quite as much as is the old island itself in the North Sea. If this be true, it is idle to talk of political maturity and ultimate independence. There is nothing, absolutely nothing, in the colonial relation to imply as a natural event separation. Separation may of course take place, but it will be the result of some external force, of some quarrel which might be avoided, and not the natural outcome of the organization itself. If the colonial policy of England a hundred years ago had been what it now is—if there had been no Navigation Laws, if the commerce of the colonies had been left free, and had not been sacrificed to the imaginary interest of English merchants and manufacturers—Queen Victoria might at this hour have been undisputed sovereign from the St. Lawrence to the Gulf of Mexico, and from the Atlantic to San Francisco. That great and most unhappy schism was not due to any inherent defect in the colonial relation such as I have described it, but was the natural result of that vicious political economy (very different, indeed, from that true economy which forms the best cement of nations) of which Napoleon rightly said that if it found a nation of granite, it would scatter it into powder. I cannot now delay you with an account of the causes which led to the War of Independence, although there are few subjects which furnish for a colonist more profitable meditation. I will merely quote to you the words of Mr. Huskisson, the statesman who in the last generation was the forerunner of all those great colonial and financial reforms which we have been accomplishing. He said* in Parliament :—" It is generally believed that the attempt to tax our American colonies without their consent was the sole cause of the separation of those colonies from the mother country. But if the whole history of the period between the year 1763 and the year 1773 be examined, it will, I think, be abundantly evident that, however the attempt at taxation may have contributed somewhat to hasten the explosion, the train had been long laid in the severe and exasperating efforts of this country to enforce with inopportune and increasing vigour the strictest and most annoying regulations of our colonial and navigation code. Every petty adventure in which the colonists embarked was viewed by the merchants of this country and

* *Speeches*, iii. 9.

the Board of Trade of that day as an encroachment on the commercial monopoly of Great Britain. The professional subtlety of lawyers and the practical ingenuity of Custom-house officers were constantly at work in ministering to the jealous but mistaken views of our seaports. Blind to the consequences elsewhere, they persevered in their attempts to put down the spirit of commercial enterprise in the people of New England, until those attempts roused a very different spirit—that spirit which ventured to look for political independence from the issue of a successful rebellion."

No such calamity as that of the American colonies is again likely to occur. None such, indeed, is now possible. And yet it is constantly taken for granted that a disruption of the empire is but a question of time. I maintain that this assumption is merely gratuitous, and is not supported by any proof. On the other side, I shall produce to you a witness well deserving of attention, the statesman by whom constitutional government was first practically administered in its full extent in a British colony, a man generally admitted to have been one of the ablest of England's many able viceroys, the late Lord Elgin. He thus writes* from Canada, where he was Governor-General, to Earl Grey, the then Colonial Secretary :—"I am prepared to contend that with responsible government, fairly worked out with free-trade, there is no reason why the colonial relation should not be indefinitely maintained." To the same correspondent he writes† on another occasion :—"We have on this continent two great empires in presence, or rather, I should say, two great Imperial systems. In many respects there is much similarity between them. In so far as powers of self-government are concerned, it is certain that our colonists in America have no reason to envy the citizens of any state in the Union. The forms differ ; but it may be shown that practically the inhabitants of Canada have a greater power in controlling their own destiny than those of Michigan or New York, who must tolerate a tariff imposed by twenty other states, and pay the expenses of war undertaken for objects which they profess to abhor. And yet there is a difference between the two cases ; a difference, in my humble judgment, of sentiment rather than substance, which renders the one a system of life and strength, and the other a system of death and decay. No matter how raw and rude a territory may be when it is admitted as a state into the Union of the United States, it is at once, by the popular belief, invested with all the dignity of manhood, and introduced into a system which, despite the combativeness of certain ardent spirits from the South, every American believes and maintains to be immortal. But how does the case stand

* *Letters and Journals*, 112. † *Ib.*, 115.

with us? No matter how great the advance of a British colony in wealth and civilization, no matter how absolute the powers of self-government conceded to it, it is still taught to believe that it is in a condition of pupilage, from which it must pass before it can attain maturity. For one, I have never been able to comprehend why, elastic as our constitutional system is, we should not be able, now more especially, when we have ceased to control the trade of our colonies, to render the links which bind them to the British Crown at least as lasting as those which unite the component parts of the Union. . . . One thing is, however, indispensable to the success of this or any other system of colonial government. You must renounce the habit of telling the colonies that the colonial is a provisional existence. You must allow them to believe that, without severing the bonds which unite them to Great Britain, they may attain the degree of perfection and of social and political development to which organized communities of free men have a right to aspire."

I have thus endeavoured to show that we colonists, although we move in a smaller orbit than England, yet gravitate with it to a common centre, and form equally with it a part of the great English nation. I have contended that except our own will there is nothing to make us cease to be a part of that nation. I will only add that it is our duty to conduct ourselves as becomes members of that nation. Our mission is to spread the British language, the British religion, the British laws, the British institutions, over this remote portion of the globe. We are not to shrink from our task from any difficulties or discomforts incident to a new society, much less are we to mar this great design by senseless quarrels among ourselves. We are not, on the one side, to abandon our posts in disgust, because some of our companions are wayward and even perverse. Nor are we, on the other hand, when we are entrusted with great powers of self-government, to abuse those powers for the advantage of one class and for the detriment of another. We have been given English institutions; but the gift is worthless unless we take care to use it in the spirit in which it has been bestowed. English institutions must be worked by Englishmen in the English way. That way implies mutual respect, mutual forbearance, a readiness to concede what is not material, tenacity in holding fast that which is good; in one word, an honest and loyal desire to promote the public benefit, and to secure to every man his just rights, and neither less nor more than those rights. Such is the course that our fathers have pursued; it is thus that England has grown to greatness; such, if we wish to obtain the like results, is the course that we, too, must follow.

III.—REPORT

Of the Committee of Elections and Qualifications of the Legislative Council.

(*Presented 12th August*, 1884.)

The Committee of Elections and Qualifications have considered the matter referred to them by the resolution * of your Honourable House bearing date 24th June, 1884.

They have examined witnesses and heard counsel on behalf of the Honourable Members to whom that resolution applies. As the question that has arisen out of the evidence is new, your Committee desire to state to your Honourable House not only the conclusions at which they have arrived, but also the reasons for those conclusions.

The Honourable Frederick Thomas Sargood was elected a Member of the Legislative Council on the 17th November, 1883. On the 28th of December, in the same year, he was appointed a Lieutenant-Colonel in the Military Forces of Victoria. No salary or other emolument was then attached to that office.

On the 9th of January, 1884, Lieutenant-Colonel Sargood obtained leave of absence during his continuance in office as Minister of Defence.

On the 7th February, 1884, regulations were made which, among other things, annexed to the office of Lieutenant-Colonel an allowance of £35 a year. The other allowances granted by these regulations are not general, but are contingent upon the performance of certain definite services. It appears, although this point is not perfectly distinct, that a like rule applies to the case of Lieutenant-Colonels, and that these officers are not entitled to receive any allowance until they have performed certain duties. These duties were not defined in the regulations of 7th February, but are specified in supplementary regulations of the 12th of May of this year. Lieutenant-Colonel Sargood has not in fact performed any duty or received any pay, and, in the opinion of the Commandant, is not entitled to receive any pay, as Lieutenant-Colonel. But he has accepted the office, and may when he pleases return to duty and qualify himself to receive his allowance.

The Act of Parliament No. 91, section 5, provides, among other things, that "if any Member of the said Council or Assembly shall

* The terms of the resolution were—"That the question whether the Honourable Colonel Sargood and the Honourable Dr. Beaney have since their respective elections accepted any offices of profit under the Crown whereby their seats in this House have become vacant, or whether either of them has done so, be referred to the Committee of Elections and Qualifications."

. . . . accept any office or place of profit under the Crown, or shall in any character or capacity, for or in expectation of any fee, gain, or reward, perform any duty or transact any business whatsoever for or on behalf of the Crown, his seat shall thereupon become vacant." The question referred to this Committee by your Honourable House is, whether, since his election, Colonel Sargood has accepted any office under the Crown whereby his seat has become vacant. The question, therefore, which the Committee is required to decide is whether, in the circumstances above stated, Lieutenant-Colonel Sargood has or has not accepted an office of profit within the meaning of the Act.

Your Committee is of opinion that the words "office of profit," as above cited, mean an office to which profit is attached by law, whether that profit be large or small, and whether it be actually received by the grantee of the office or not. As a business * means an undertaking by which it is intended that money should be made, although in fact it has resulted in a loss, so an office of profit is an office from which the law intends that profit shall be received, even though the grantee may have waived all claim to such profit. That the amount or the receipt of profit is immaterial is shown from the well-known use of the acceptance of the Stewardship of the Chiltern Hundreds and other similar offices as a means of avoiding the duty of serving in the House of Commons. It has been held, too, both in this country † and in England,‡ that the acceptance of an office to which by law a salary is annexed, even though the appointment be made in express terms without salary, vacates the seat of the grantee.

It further appears that the acceptance of an office of profit implies that profit must be attached to the office at the time when the acceptance took place. The Act contemplates the acceptance of an office of profit, not of an office which becomes profitable. When a person accepts an honorary office to which a salary is subsequently attached, he holds indeed an office of profit; but he cannot fairly be said to have accepted such an office. The Act might have provided that, if any person accept an office of profit, or any profit arising from any office, his seat shall become vacant. But it has not used any such words; and, as it involves penal consequences, and must therefore be strictly construed, your Committee do not feel that they are at liberty to extend its operation beyond the limit which its terms actually express.

This construction is confirmed by a case which the Committee feel that they are bound to regard. The circumstances of the two cases

* *Bramwell v. Lacey*, 10 Ch. D. 691; *Rolls v. Miller*, 25 Ch. D. 206.

† Report of Select Committee on Privilege, Leg. Ass., 12th March, 1861.

‡ May, *Parl. Practice* (9th ed.), p. 708.

are not indeed in all respects alike, but the reasoning and the construction given to the corresponding English Act are directly in point, and the authority by which the question was decided is so high as to entitle it to the utmost respect. In 1809, Mr. Perceval,* while Chancellor of the Exchequer, succeeded the Duke of Portland as First Lord of the Treasury, but retained his former office. Doubts arose as to whether Mr. Perceval in these circumstances had, or had not, vacated his seat. The matter was referred to the Attorney and the Solicitor General, to the Lord Chancellor (Lord Eldon), and to the Speaker (Abbott, afterwards Lord Colchester). It was unanimously agreed that the seat was not vacated, and upon their advice no writ was issued. Lord Eldon wrote :—"I think Mr. Perceval's seat is not void by any acceptance of any office of profit since his election. The Act has not said that if the King gives an increase of profit to a person already holding an office of profit, his seat shall be void ; but only that if any person accepts an office of profit, his seat shall be void." The Speaker wrote :—"I think with you that, under the Statute of Anne, there must be the concurrence of office and profit conjointly in the new grant which is to vacate the seat. To re-accept the same office under a new commission has never in practice been held to vacate a seat ; and the acceptance of a new annexation of profit to an office already in possession has been considered equally free from the same consequences."

Your Committee is therefore of opinion that the office of Lieutenant-Colonel Sargood is now an office of profit, and that its character is not affected by the circumstances that its remuneration is small, or that Lieutenant-Colonel Sargood has obtained leave of absence from its duties, or that he has not up to the present time qualified himself, as he might have done, to receive payment for his services. But they do not think that in the circumstances above stated he can be said to have accepted an office of profit. He accepted an office which, at the time of his acceptance, was not an office of profit, and although it has subsequently become profitable, he does not thereby come within the provisions of the Act so as to vacate his seat.

Two further questions here arise. First, whether Lieutenant-Colonel Sargood comes within that provision of Section 5 which relates to the performance of any duty or the transaction of any business for or in expectation of any fee, gain, or reward. Your Committee are of opinion that Lieutenant-Colonel Sargood has not, up to the present time, done any act which brings him within the meaning of this provision. The other question is, whether he comes within the meaning

* Walpole's *Life of Perceval*, ii. 52.

of Section 1, which enacts that no person who shall hold any office or place of profit under the Crown shall sit or vote in the Council. It is not necessary to decide whether this section is or is not limited to persons who are newly elected members of Parliament. It suffices to say that the consequence of disobedience is not the vacation of the seat, but the liability * to a pecuniary penalty. The matter, therefore, is not within the jurisdiction of your Committee.

The case of the Honourable Dr. Beaney is, so far as regards the acceptance by him of office, similar to that of the Honourable Lieutenant-Colonel Sargood, and the same observations apply to both cases. But in one important respect there is a difference between them. There is evidence which appears to show that Dr. Beaney did actually perform certain duties in respect of which he was entitled to remuneration. Dr. Beaney has stated that, at the time at which he performed these duties, he was not aware that any remuneration for them had been provided; that he has not received any such remuneration; and that he thought when he performed them that he was merely discharging the ordinary duties of an honorary office. The terms of the reference to your Committee relate only to the acceptance of office, and although they should not have hesitated to ask your Honourable House in the public interest for an extension of the scope of their inquiry, yet, having regard to the fact that Dr. Beaney's seat will become vacant by effluxion of time on the 15th of the present month, your Committee do not think that it is necessary to make any special report in the matter.

On the whole, then, your Committee have the honour to report that in their opinion neither the Honourable Frederick Thomas Sargood nor the Honourable James George Beaney has accepted, since his election, any office under the Crown whereby his seat has become vacant.

IV.—MEMORANDUM

In Reference to the Ruling of the Honourable the President on the Explosives Bill, 1885.

1. In the Legislative Council, on the order of the day for the third reading of the Bill to consolidate and amend the law with respect to importing, manufacturing, carrying, storing, and selling gunpowder and other explosive substances, it was moved that the bill be re-committed for the purpose of omitting

The statement of the case.

* Section 10.

certain specified clauses. It was admitted that the reason for the proposed omission was the belief that the House was not legally enabled to originate such clauses. To this motion objection was taken on the ground that the clauses in question were within the competence of the House. The President was asked to express his views, and, after having taken time to consider, read* a written opinion. This document, together with the questions which it involves, was referred to this Committee. In these circumstances this Committee has to consider what restrictions are imposed by law upon the legislative powers of the Council. In the case of avowed money bills there is little room for difference of opinion. But it is still matter of dispute whether the disabilities of the Council do or do not extend to cases of pecuniary provisions which are not the object of the bill that contains them, but are merely subsidiary to its operation.

2. The President is of opinion that the proposed omission of money clauses is correct : first, because it is in conformity with the previous practice of the House ; second, because it is in conformity with the practice of the Imperial Parliament ; third, because it is consistent with Sections 56 and 57 of the Constitution Act.

The President's arguments.

The first of these reasons really assumes the whole matter in dispute. It is precisely because on some former occasions concessions have been made, or objections have been waived, or inadvertencies have occurred, that it has now become necessary to determine whether this alleged practice was, or was not, well founded. If it be well founded, the dispute is at an end. If it be not well founded, means must be taken to prevent the usage from becoming inveterate, and to secure the Council against being estopped in the exercise of its rights. It is not what the Council has done, but what it lawfully might have done, and may do, that is now under consideration.

The argument from the practice of the Council.

Apart from any specific instances, two proofs of an intention by the House to adopt this usage are alleged. One is, that the House has not adopted rules such as the Legislative Assembly has adopted for dealing in Committee with proposed money matters. The other is that the matter has already been settled by an agreement between the two Houses.

It is possible that sufficient provision for this purpose has been made under that Standing Order† which directs that, in the absence of any specific rule, resort shall be had to the rules and practice of the House of Commons. But whether this view be correct or not, such

* On the 6th October, 1885. † S.O. 302.

an omission, if it were intentional, is evidence that the Legislative Council did not think that these rules were necessary, but not that it intended to abandon any right that it possessed. The second contention is more serious. It rests upon the result of a conference between the two Houses in April, 1867. It was then agreed that the practice of the Lords and of the Commons should be followed in matters arising under bills which are required to originate in the Legislative Assembly, and in all matters of supply; and this proposal was adopted by each of the two Houses. Such an agreement, if it were really established and acted upon, ought not lightly to be set aside. But it never amounted to more than a treaty for an agreement, and it never has been followed in practice. The first difficulty was the mode of giving to the resolution legal effect. It was contemplated that it should be reduced to the form of a Standing Order; but in this form it could not be suspended; and as such a result was not desired, that course was abandoned, and no other was suggested. Very shortly afterwards further disagreements arose as to the meaning of this resolution. A second conference was held, which separated without coming to any understanding, and the whole matter fell to the ground. Thus the resolution in question remained a mere vote, and as such expired with the session in which it was passed. This result was foreseen, and not denied in the discussion at the second conference abovementioned. The failure of this agreement was often noticed with considerable acrimony in the subsequent controversies, and no attempt was ever made to rely upon its validity. It is still more important to observe that, even if this agreement were still in operation, it has no bearing upon the present question. It is in its terms limited to "Bills required by the 56th Section of the Constitution Act to originate in the Legislative Assembly" and "to all subjects of aid and supply." But the difficulty in the present case has arisen in respect to bills which are not required so to originate, and to matters which are not connected with aid or supply. It is not contended that the Explosives Bill ought to have originated in the Legislative Assembly: and the fees chargeable under it are not for the purpose of providing revenue, but for carrying into effect the bill.

The argument from the practice of the Imperial Parliament.

The second ground upon which the alleged disability of the Legislative Council is maintained is the practice of the Imperial Parliament. It is unnecessary to discuss the exact relations between the two Imperial Houses, because it is certain that whatever these relations may be they afford no assistance in the present case. It has long been settled* beyond all

* *Keilley v. Carson*, 4 Moore P. C. C. 63.

controversy that that portion of the Common Law which is known as the *Lex et Consuetudo Parliamenti* is strictly local, and does not cross the sea with the British emigrant as a portion of his birthright. Had this part of the English law not been introduced into this country by special enactment, we should have had no direct interest in it. "The law and practice of Parliament as established in the United Kingdom," say the English law officers* (Cockburn and Bethell), "are not applicable to Colonial Legislatures, nor does the rule of the one body furnish any legal analogy for the conduct of the other." If, therefore, English precedent be of any value in this matter, it must be by reason of some provision in the colonial law by which that precedent was introduced. But no such provision exists. On the contrary, the Adopting Act † places the two Houses on precisely the same line—that, namely, which is indicated by the Constitution Act. Each of them has the powers, privileges, and immunities which the House of Commons possessed on the 23rd November, 1855.

A just deference to the authority of the President, who appears to place some reliance upon it, but no other reason, leads to a notice of the 34th Section of the Constitution Act. This section directs the Legislative Council and the Legislative Assembly in their first session to prepare Standing Orders, and provides that, until these Standing Orders come into force, resort shall be had to the practice "of the Imperial Parliament." This direction was obeyed. The Standing Orders were duly made, and, except so far as it relates to the Governor's assent, nothing remains upon which the 34th Section can operate. If it be alleged that the Imperial practice—that is, the practice of the two Houses—survives where the Standing Orders are silent, the answer is, that the Standing Orders of the Council in express terms take as their standard of reference the practice, not of the Imperial Parliament, but of the House of Commons.

It is further insisted that it was the intention of the Constitution Act to create two Houses as like to the two English Houses as legislative enactment could make them, and from this alleged intention it is inferred that a complete identity in the two sets of relations must be implied. The intention of the Constitution Act must, of course, be ascertained by the study of the whole of that Act itself, and not from any external authority. Consequently, the argument amounts merely to the statement which is certainly true—that it is in the Constitution Act alone that the powers of the Council, and the limitations of these powers, can be found. But the Constitution Act nowhere attempts to establish so perfect a resemblance between the two

* Forsyth's *Opinions on Const. Law*, 25. † Act No. 1.

Parliaments as that above indicated. On the contrary, it leaves almost the whole of the law and practice of Parliament to the Colonial Parliament to be dealt with at its discretion. Some leading rules it has enacted, and so converted from mere usage into positive law. Further, it has prohibited the Colonial Parliament from extending its privileges beyond the mark fixed by the date of 1855. Thus, the Parliament of Victoria, like the Parliament of Canada,* is unable to pass an Act giving either House the power to examine witnesses upon oath, although by a recent statute the House of Commons possesses that power. The facts, therefore, although they may certainly not altogether fit with some preconceived and popular opinions, appear to show that the framers of the Constitution made a careful selection of those parts of Parliamentary law which seemed fit for their purpose, and that no inference can be drawn that they meant to imply those other parts of that law which they deliberately forbore to include.

4. The third contention as to the disability of the Council is, that such a view is consistent with Sections 56 and 57 of the Constitution Act. The whole question does, indeed, turn upon the construction of that Act, and upon nothing else. But something much more than mere consistency with these sections is necessary to divest the Council of its *primâ facie* right to deal in its own fashion with every part of every bill that comes before it. Nothing less than express words, or some irresistible inference, can produce such an effect. No attempt has been made to show either the one or the other. It is, therefore, needless to criticise the proposed mode of reading together Sections 56 and 57. The error of such a method will appear in the following paragraph. It is enough here to repeat that even if the proposed construction were true it would be insufficient for its purpose; and that the meaning of the Act must be ascertained from a comparison of all its provisions, and not from any fancy as to the possible meaning that two isolated sections may, with a little ingenuity, be made to bear.

The argument from ss. 56 and 57 of the Constitution Act.

A curious *argumentum ad absurdum* is used to eke out this theory of consistency. It is said that unless the proposed restriction existed it would be possible, by adding to a bill a few clauses of other matter, to alter the law in a high degree, and to impose heavy burthens upon the people. There is, however, a perceptible difference between imposing such a burthen and proposing to impose it: and as the imposition requires the consent of the other branches of the Legislature the imaginary inconvenience loses some of its weight. Further,

* See Todd's *Parl. Govt. in the Brit. Colonies*, ch. vi. pp. 146–

whatever force such an argument might have in the case of an hereditary peerage, it has no application to a House which represents the great majority of the ratepayers, and by far the greater part of the property of the country. The reason of the law, it is said, is the life of the law; and when that reason ceases the law ceases. If, therefore, such a rule for such a reason exists in England, there is no ground to infer that it exists also in Victoria.

5. It thus appears that the reasons upon which the President relies are insufficient to justify the momentous conclusion at which he has arrived. No binding usage of the Council has been proved. The practice of the Imperial Parliament does not, in the language of the English law officers, furnish "even a legal analogy," much less a specific authority. No express provision of the Constitution Act can be shown; yet the claim virtually touches both the usefulness and the dignity of the Council, and consequently cannot be admitted except upon the clearest evidence. It becomes necessary, therefore, to examine carefully the Constitution Act, and to ascertain from it exactly what the Council may do and from what it ought to forbear. It must be repeated that the instrument which has created the Colonial Parliament can alone determine what are the powers of that Parliament and what are the mutual relations of its component parts. Such an inquiry can be successful only according to the known rules of interpretation, and by a careful study and comparison of the various parts of the Act, and with a steady determination to make our theories square with the law, and not the law with our theories.

The construction of the Constitution Act.

The first section of the Constitution Act confers upon the Victorian Parliament plenary powers of legislation, without restriction and without distinction. It empowers Her Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly, "to make laws in and for Victoria in all cases whatsoever." Subsequent portions of the Act, however, introduce various limitations. This object is effected in a somewhat peculiar manner. The form of direct limitation is not used, but various powers are re-enacted in general terms, and to these re-enactments provisoes are added which contain the desired restrictions. In these sections the affirmative words are merely introductory, and for any other purpose are superfluous. Their real effect is contained in the several provisoes, and their operation is restrictive, and not enabling. Of these sections, some limit the powers of the whole Legislature. Others do not limit the powers, but provide for their exercise in a certain specified way. Others, again, modify the action, not of the whole Legislature, but of each of its component parts. To the first

Section 1.

class belong the sections* which limit the privileges of Parliament to those in existence at the time of the passing of the Constitution Act: and which forbid Customs duties upon goods required for Her Majesty's forces, or in contravention of Her Majesty's treaties; and which forbid differential duties—a restriction which later legislation has to some extent removed. To the second class† belong those sections which provide for an alteration of the Constitution or of Schedule D (the Civil List). To the third class‡ belong the sections which increase the power of the Governor in legislation, by giving to him the power of amendment; and which limit in certain directions the powers of the Legislative Council and of the Legislative Assembly respectively.

6. It appears, then—and these views are founded upon a judgment§ of the Supreme Court—that Section 1 is the primary enabling authority: and that Sections 56 and 57 are substantially two independent provisoes upon Section 1—and not the one upon the other—the former relating to the Legislative Council, the latter to the Legislative Assembly. In these circumstances, to the question how far Section 1 is limited by Section 57, the answer is plain. The Legislative Council may exercise all its powers, under Section 1, except that it may not either originate or alter any bill—

The construction of Section 56.

(*a*) For appropriating any part of the revenue of Victoria; or,

(*b*) For imposing any duty, rate, tax, rent, return, or impost.

In other words, the powers of the Council are restricted to the extent mentioned in the case of bills for appropriating revenue and for providing Ways and Means, but no further or other restriction is expressed. Thus, the Constitution Act enacts as rules of positive law for the regulation of the Council, the rule as to origination, which is a rule of the English Common Law, and the rule as to amendments, which is a comparatively modern claim of the House of Commons, not indeed admitted, but habitually acquiesced in, by the House of Lords.

The expression "a bill for appropriating" is not equivalent to the expression "a bill which appropriates." The former expression necessarily includes the latter, and consequently there is a certain resemblance between the two. But a bill for appropriating means not only a bill which does in fact appropriate, but a bill of which the object is appropriation. In Parliamentary terms it is a bill of which the title expresses the purpose of appropriation, and of which the body is in accordance with the title. In like manner, a bill "for imposing" duties or taxes is a bill of which the object, as stated in its title, is the

* See Ss. 3, 14, 44.
† Ss. 9, 10, 57.
‡ Section 54.
§ *Attorney-General v. Glass*, 1 W. & W. at p. 60.

imposition of such duties or taxes, and of which the title fairly corresponds with the contents.

This distinction is not a mere subtlety. It marks very clearly the line between the original claims of the House of Commons and the later extension of those claims. When in a resolution upon which it is said * that all proceedings between the two Houses in matters of finance are now founded, the House of Commons insisted that "all Aids and Supplies and Aids to His Majesty are the sole gift of the Commons, . . . which ought not to be changed or altered by the Lords," their meaning would be fairly expressed by a modern draftsman in the words "all bills for imposing any duty, rate, tax, &c., shall originate in the Commons, and may not be altered by the Lords." If such a draftsman were instructed to extend these privileges of the Commons from Bills of Aid and Supply to all bills which impose any kind of pecuniary burthen upon the people, he would probably alter the first four words of his sentence from "all bills for imposing" into "all bills which impose." Why the framers of the Constitution Act preferred the earlier to the later practice of the House of Commons it is not difficult to conjecture. The rule as to origination was admitted to be actual law. The rule as to amendments was practically accepted. But as to the later extension of these rules, many competent critics, and notably Mr. Hallam,† did not hesitate to say that "there was more disposition shown to make encroachments than to guard against those of others." It may well, therefore, have appeared prudent in legislating for a new country to enact as a part of its Constitution the general and accepted principles of the English law relating to finance, and not to import those more doubtful adjuncts and corollaries which high authorities had not entirely approved, and which had arisen often from local or temporary jealousies, and always under conditions which in this country we cannot, even if we wished to do so, reproduce.

It follows that a bill which, in addition to matter of appropriation or of taxation, contains any foreign matter—that is, any matter which is not fairly pertinent to the appropriation or the imposition, as the case may be—is not a bill for appropriating revenue or for imposing taxation within the meaning of this section. It is a bill for appropriating or for imposing, but also for some additional and different purpose. But it is not to such composite views that the protection of this section is given. That protection belongs to a bill for appropriating revenue on the one hand, or for imposing taxation on the other hand, pure and simple. The section belongs to a class which is always construed strictly, and there are many analogies in Parliamentary

* May, *Parl. Practice*, 539. † *Const. Hist.*, iii. 32.

practice to justify in the present case an adherence to this principle of interpretation. If, then, any such compound bill be presented to the Legislative Council, that House appears to be competent to deal with such a bill and every part thereof as freely as it may deal with any ordinary bill that comes before it. By this simple means the Constitution Act gives ample security against the danger of that fraud upon its provisions which is commonly known as "a tack."

Two further observations on the meaning of this section may here be made. It has been sometimes alleged that because by the Interpretation Act all fines and similar charges are payable into the Consolidated Revenue, they, even when they are imposed incidentally, come within the terms of the 56th Section. They undoubtedly do so come when they reach the revenue—that is, when the bill relating to them becomes an Act, and when in pursuance of that Act the fine is imposed and recovered. But until the bill becomes law, the fines mentioned in it are not part of the revenue, and by this supposition the bill is not a bill for their imposition. It has also been thought that the mere use of the words "duty, rate, tax, rent, return, or impost," is sufficient to bring the clause containing them within the meaning of the 56th Section. But there is no magic in a word. The real question in every such case is not whether a particular expression is used, but whether the bill is really a bill for the imposition of the burthens thus enumerated.

7. Section 57, in effect, prohibits the Legislative Assembly from dealing with any proposal for appropriation in the absence of a recommendation from the Governor. This provision converts into law a well-known Standing Order of the House of Commons. As this Standing Order was meant to regulate that House's own proceedings, it did not affect, or pretend to affect, the other House. The corresponding provision in the Constitution Act does not therefore concern, or at least directly concern, the Legislative Council. It may be observed that the 56th Section, by imposing duties of forbearance upon the Legislative Council, gives corresponding rights to the Legislative Assembly. But under the 57th Section the right which corresponds to the duty thereby imposed on the Legislative Assembly belongs, not to the Legislative Council, but to the Governor. This reason is in itself sufficient to show that the proposal of the President to read Sections 56 and 57 as one section, "57 being regarded in the light of a proviso to 56," is untenable. The two sections are distinct provisions, relating to distinct matters, generating distinct rights, and corresponding to distinct rules of English Parliamentary law.

The construction of Section 57.

8. In connection with the 57th Section, although not dependent

upon it, an important question arises. The object of that section is to provide that for any appropriation of revenue by the Assembly the recommendation of the Governor is required. The practical utility of this rule is generally recognized. Its theory is, that the Crown is the head of the public service, and is consequently the proper official organ through which the needs of that service are made known to Parliament. It is the duty of Parliament not to expend the money of its constituents for any unnecessary purpose ; and to prove the necessity, the evidence of the official head of the service is essential. This rule applies only to the appropriation of revenue, and not to the finding of ways and means, a matter in which the Crown has no special concern. The 57th Section prohibits the Legislative Assembly from dealing with any appropriation unless it has received a message of recommendation ; and the 56th Section prohibits the Legislative Council from originating bills for the appropriation of revenue. Thus no provision is made for cases of incidental appropriation in bills that originate in the Legislative Council. For example, a bill relating to explosives might contain provisions touching the appointment of a new officer, for the payment of whose salary an appropriation of revenue might be involved. All such provisions might, indeed, be contained in separate bills ; but such a course would probably be found in practice to be inconvenient. It is probable that this matter is a *casus omissus*, and it is easy to see how, in reducing to the form of a legislative enactment several different English rules established at different dates * and without any mutual relations, such an error might have occurred. It certainly is not desirable that any deviation from so important a principle should be admitted, although, as has been before remarked, the question lies not between the two Houses, but between the Governor and either of them. In its present aspect the case may perhaps be met by the aid of that Standing Order to which reference has previously been made, and by the application to the Legislative Council of the rule of the House of Commons. Under this rule so applied no clause which appropriates revenue could, in any bill not required to originate in the Assembly, be received by the Legislative Council without a recommendation from the Governor. Thus there would practically be a distinction between incidental appropriations and incidental charges. In each case the Constitution Act is silent, and consequently no legal restriction is imposed. But in the case of appropriations the Legislative Council

Case of incidental appropriation.

* The dates of these rules are as follow: — For the origination of money bills, "the Indemnity of the Lords and Commons," 1408. For the prohibition to amend money bills, resolution of House of Commons, 1678. For the recommendation of the Crown, Standing Order of House of Commons, 1706.

would, like the House of Commons, spontaneously recognize the wisdom of the limitation, and would by its own action supplement the omission of the law. In the case of incidental charges, where no similar right of the Crown is involved, no reason for any such forbearance can be shown to exist.

9. The result of the whole inquiry is, that there is absolutely no authority for the proposition that the Legislative Council is in any way restricted in dealing with bills which, incidentally only, impose any charge upon the public, or upon any class of the public. Case of incidental charge.

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* In page 409, four lines from the end, the word "Westminster" is printed in error for "Wellington."

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